



Office of the Attorney General
State of Texas

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March 15, 1994

Mr. Leonard W. Peck, Jr.
Assistant General counsel
Legal Affairs Division
Texas Department of Criminal Justice
Institutional Division
P.O. Box 99
Huntsville, Texas 77342-0099

OR94-122

Dear Mr. Peck:

The Texas Department of Criminal Justice ("TDCJ" or "department") has received requests from members of the media pursuant to the Texas Open Records Act, Government Code chapter 552, for the report of an internal review of the management and release of a parolee who murdered a child while on parole. These requests have been assigned ID#s 24425 and 25021.

We note that the investigative report was prepared by the internal affairs division of TDCJ at the request of a member of the Texas Board of Criminal Justice. You have submitted to us the report of the investigation, which includes a narrative portion prepared by an investigator of the internal affairs division and nine attachments consisting of copies of records obtained from various sources that were reviewed by the investigator in the course of the investigation. We will first address the availability of the narrative portion of the report (the "narrative report").

Although you recognize the strong public interest in the information at issue, you have expressed concern that the entire narrative report may constitute confidential information within section 552.101 of the Government Code, in conjunction with article 42.18, section 18 of the Code of Criminal Procedure. Section 552.101 applies to "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Article 42.18, section 18 of the Code of Criminal Procedure provides in pertinent part as follows:

All information obtained and maintained in connection with inmates of the institutional division subject to parole, release to mandatory supervision, or executive clemency, or individuals who may be on mandatory supervision or parole and under the supervision of the pardons and paroles division, or persons directly identified in any proposed plan of release for a prisoner, including victim impact statements, lists of inmates eligible for parole, and inmates' arrest records, shall be confidential and privileged information and shall not be subject to public inspection; provided, however, that all such information shall be available to the governor, the members of the [Board of Pardons and Paroles], and the Criminal Justice Policy Council to perform its duties under Section 413.021, Government Code, upon request. [Emphasis added.]

Section 18 of article 42.18, Code of Criminal Procedure, accords confidentiality to records of the Board of Pardons and Paroles and the pardons and paroles division concerning inmates who are subject to parole and persons who are on parole under the supervision of the pardons and paroles division. *But see* Open Records Decision Nos. 190 (1978); 33 (1974) (basic information is available from inmates' and parolees' files, including ages, addresses of record, and other information normally found in courthouse records). While the investigatory narrative report at issue here summarizes information relative to the parole process, some of which was obtained from confidential files, it is a unique document produced by the internal affairs division of TDCJ. It was prepared specifically in response to a directive that an internal investigation be conducted into the procedures followed by the pardons and paroles division in performing its public duties. The purpose of the report was to examine the functioning of the parole process. The document was not produced for the purpose of deciding whether a particular inmate should be paroled and was not available to the pardons and paroles division in connection with that deliberative function. This document is thus clearly distinguishable from records normally found in an inmate's parole file, such as victim impact statements, and, as a result, is not within the scope of article 42.18, section 18. Recognizing the significant and legitimate interest of the public in the operation of the state parole system, we do not believe that the legislature intended the Open Records Act, in conjunction with article 42.18, section 18, to withhold from the public this investigatory narrative report. *See also* Gov't Code § 552.001 (the Open Records Act must be liberally construed in favor of granting public access). We hold that article 42.18, section 18 does not prohibit the department from releasing to the public the narrative report at issue, but emphasize that this determination is limited to the specific facts of this unique situation.

You also argue that portions of the narrative report are excepted from release pursuant to the privilege of self-critical analysis, which you describe as a privilege from discovery of information generated by a critical self-analysis undertaken by the party

seeking protection from discovery. We conclude that none of the narrative report may be withheld on the basis of this privilege. *See* Open Records Decision No. 575 (1990).

You next state that some portions of the narrative report are excepted from disclosure by section 552.111 of the Government Code, which applies to "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception protects internal agency communications consisting of advice, recommendations, opinions and other material reflecting the policymaking processes of the governmental body; purely factual information is not excepted from disclosure by section 552.111. Open Records Decision No. 615 (1993). We have examined the narrative report and have determined that the great majority of this report consists of factual material. We have marked the few passages that constitute advice, opinion, or recommendation under section 552.111. However, we point out that section 552.111 is a discretionary exception to required public disclosure under the Open Records Act, and that TDCJ may voluntarily release these passages to members of the public if it so chooses.¹ As you raise no other exception under the Open Records Act in regard to the narrative report, except as discussed above, the narrative report is open in its entirety to the requestors.²

We next turn to the attachments, which consist of records reviewed by the investigator in preparing the narrative report. You state that the following information in the attachments is public information and will be made available to the requestors:

Attachment 2: Commitment Data Form copied from the TDCJ inmate record file;

Attachment 4: Records of the Dallas County District Clerk, with exceptions that we will deal with later in this ruling;

¹We understand that the Board of Criminal Justice has already conveyed most of the narrative report to a state senator. We note that information excepted from disclosure under the Open Records Act may be transferred between state agencies without destroying its confidential character and that such transfer would not result in a waiver of the act's discretionary exceptions. *See* Open Records Decision No. 516 (1989); Attorney General Opinion M-713 (1970) (interagency sharing of data is not a public disclosure of the data). *See also* Gov't Code § 552.008; Open Records Decision No. 163 (1977) (a governmental body may not use the act's discretionary exceptions to withhold information from a legislator who seeks the information for legislative purposes).

²We have also marked a very small portion of the report which is protected by common law privacy under section 552.101. Although you did not raise the common law privacy doctrine in conjunction with section 552.101, common law privacy is not waiveable by the governmental body and this office will raise it when the governmental body fails to do so. *See* Open Records Decision Nos. 344, 325 (1982).

Attachment 8B, pages 1-3: Administrative Memorandum of TDCJ Pardons and Paroles Division; Subject: Sex Offender Registration Program;

Attachment 8C: Newspaper articles;

Attachment 8D: Personnel payroll information, with exceptions that we will deal with later in this ruling; and

Attachment 8F: Statutes.

You claim that the following records are excepted from disclosure by article 42.18, section 18 of the Code of Criminal Procedure:

Attachment # 3: Board of Pardons and Paroles Parole Score Datasheet;

Attachment # 6: Parolee's main parole file from Austin office of Pardons and Paroles Division;

Attachment # 7: Parolee's Field Parole File from Dallas Parole Office;

Attachment # 8: Certain pages of this attachment, which consists of information from a number of sources; and

Attachment # 9: Information Received from Gatesville Parole Office.

We have examined these attachments and have marked as excepted from disclosure by section 18 of article 42.18, Code of Criminal Procedure, any records of the pardons and paroles division that relate to identifiable inmates and parolees. However, some of the records in these attachments constitute records of the Board of Pardons and Paroles that do not pertain to an individual identifiable inmate, such as the interoffice memoranda in attachment nine that set out policies and procedures of the board. These documents are not "maintained in connection with inmates of the institutional division subject to parole . . . or individuals who may be on . . . parole and under the supervision of the pardons and paroles division." Accordingly, they are not excepted from disclosure by section 18 of article 42.18, Code of Criminal Procedure.

Attachment eight includes in subdivision D payroll information about the TDCJ employees interviewed in connection with the investigation. The home addresses and social security numbers of the employees are excepted from disclosure by section

552.117(2) of the Government Code. The code identifying the bank in which the employee's paycheck is deposited and employee's bank account number are private financial information excepted from disclosure by section 552.101 of the Government Code. *See* Open Records Decision No. 600 (1992). The remaining payroll information is open to the public.

Attachment eight, subdivision E, consists of the employee resume of an employee of the pardons and paroles division, a letter written by the employee, and lists of the number of personal interviews and administrative reviews during the years 1982 through 1991. We see no basis for withholding this information from the public. *See* Open Records Decision No. 455 (1987).

We will next address attachment one, a letter from a member of the Texas Board of Criminal Justice to the internal affairs division requesting the investigation that resulted in the report under consideration. You argue that this letter is excepted from disclosure by section 552.101 of the Government Code, in conjunction with the privilege of self-critical analysis. We have already stated that this privilege is not incorporated into section 552.101 of the Government Code. *See* Open Records Decision No. 575. Accordingly, the privilege of self-critical analysis does not except attachment one from disclosure under the Open Records Act. Since you cite no other exception for this letter, it must be made available to the requestors.

We next consider portions of attachment four that you believe should be withheld from disclosure. This attachment consists of the records of the Dallas County District Clerk concerning the offense that led to the initial incarceration of the parolee. Most of this file is open to the public, but you believe a few pages are excepted from disclosure pursuant to the Open Records Act. Pages DC-3 through DC-5 consist of criminal history information concerning the parolee maintained by the Federal Bureau of Investigation and the Department of Public Safety. This information is not available to the requestors. Open Records Decision No. 565 (1990).

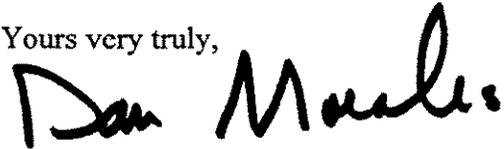
You claim that pages DC-8 through DC-18, the police report concerning the offense for which the parolee was incarcerated, is excepted from public disclosure by section 552.108 of the Government Code, except for the two-page offense report. The police report concerns a closed case. You have not shown that release of this report will unduly interfere with law enforcement. *See* Attorney General Opinion MW-446 (1982). Accordingly, it is open in its entirety. You also believe that page DC-24 is excepted from disclosure by section 552.108. Page DC-24 is a page of the District Clerk's Record of Convicts that includes the conviction for which the parolee was incarcerated. This record states case number, name, offense, dates of verdict, and sentence of this individual as well as other persons convicted of crimes in the same judicial district around the same time. Page DC-24 summarizes conviction information that is available to the public in the

records of the Dallas County District Court. It is not excepted from disclosure by section 552.108 of the Government Code.

Attachment five is the TDCJ inmate record file of the parolee. You state that it is specifically made sensitive by the Stipulated Modification of Section II and Section IIA of the amended decree in *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part and vacated in part*, 679 F.2d 1115 (5th Cir.), *amended in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). Therefore, you state that Attachment 5 is confidential under sections 552.101 and 552.107 of the Open Records Act. On the basis of Open Records Decision No. 560 (1990), we conclude that the inmate record is not available under the Open Records Act.

If you have any questions with regard to this letter ruling, please refer to ID# 24425.

Yours very truly,



Dan Morales
Attorney General of Texas

SJS/SG/rho

Ref.: ID# 24425
ID# 25021

Enclosures: Submitted documents

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