



September 25, 2000

Ms. Laura McElroy
General Counsel
State of Texas Board of Pardons and Paroles
209 West 14th Street, Suite 500
Austin, Texas 78701

OR2000-3696

Dear Ms. McElroy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 139342.

The Board of Pardons and Paroles (the "board") received a written request for the clemency petitions filed with the board for three named inmates. You contend that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code.

Section 508.313(a) of the Government Code provides:

(a) All information obtained and maintained [by the board], including victim protest letters or other correspondence, victim impact statements, lists of inmates eligible for release on parole, and an arrest record of an inmate is confidential and privileged if the information relates to:

- (1) an inmate of the institutional division subject to release on parole, release to mandatory supervision, or executive clemency;
- (2) a releasee;¹ or
- (3) a person directly identified in any proposed plan of release for an inmate.

¹"Releasee" means a person released on parole or to mandatory supervision. Gov't Code § 508.001.

Gov't Code § 508.313(a) (footnote added).

By its terms, section 508.313(a) makes confidential information that concerns three categories of persons: (1) inmates of the Texas Department of Criminal Justice's ("TDCJ") institutional division who are subject to parole, release to mandatory supervision, or executive clemency; (2) releasees (persons released on parole or to mandatory supervision); and (3) a person directly identified in any proposed plan of release for an inmate. This office has applied the predecessor provision of section 508.313(a) to the board's pardon files, but only when such files concern an inmate. *See* Attorney General Opinion H-427 (1974); Open Records Decision No. 190 (1978); *see also* Gov't Code § 508.052(a) (permitting TDCJ to provide the board access to TDCJ's computerized and printed records).

In Attorney General Opinion H-917 (1976), we first announced that this office would follow the uniform rule that the common law right of privacy lapses upon death. *See* Open Records Decision No. 272 (1981). We have determined, however, that there is no similar presumption that prohibitions against disclosure in confidentiality statutes lapse upon the death of the subject of the information. Attorney General Opinion DM-61 at 3 (1991), JM-851 at 2 (1988); *see also* Attorney General Opinion JM-229 (1984); Open Records Decision No. 529 (1989). Whether a confidentiality provision lapses upon death is a question of statutory construction. Attorney General Opinion DM-61 at 3 (1991); Open Records Decision No. 524 at 3 (1989). We have previously stated that a confidentiality provision will lapse upon death when the statute is enacted merely to protect information that would be covered by a common law right of privacy or when the statute only protects a living person's privacy. Open Records Decision Nos. 536 (1989) (provision which protects police officer's photograph ceases to apply after death of officer), 524 at 3 (1989) (confidentiality of student records under Gov't Code § 552.114 lapses upon death). In other instances where we have found that a statutory provision would lapse upon death, we have determined that the statute was specifically applicable to living persons, and the circumstances involved the release of the information in question based on another statutory obligation. Attorney General Opinion DM-61 (1991) (death certificates); Open Records Decision No. 529 (1989) (autopsy reports). Conversely, we have held that when nothing in the statute indicates that the legislature intended the confidentiality provisions to apply only during lifetime, the statutory protection would not lapse upon the death of the subject of the information. Attorney General Opinion JM-851 at 2 (1988), JM-229 at 4 (1984).

At the time that the requested information was obtained and maintained by the board, it related to an inmate subject to executive clemency. After reviewing section 508.313, we find nothing in the statute itself to indicate that the legislature intended the provision to apply only during the lifetime of the inmate. Furthermore, the confidentiality provision appears to protect more than the inmate's privacy interests. It protects the deliberations of the board by encouraging frank and open discussion in its decision-making process. We conclude, therefore, that the board must withhold the requested information under section 508.313 of the Government Code, regardless of the fact that one or more of the inmates in question may have been deceased at the time the records request was made.

Regarding future requests for the clemency petitions that the board receives, the board may rely on this open records letter to withhold the requested information. The board need not seek a decision from this office as to future requests for this information. Please note, however, that this letter ruling does not affect any right of access to the clemency petitions by the governor, a member of the board, the Criminal Justice Policy Council, or any "eligible entity," as defined in section 508.313(d). *See* Gov't Code § 508.313(c). Nor does this letter ruling apply to sex offender information that is subject to required public disclosure under chapter 62 of the Code of Criminal Procedure, *see id.* § 508.313(e), or to general inmate information subject to required public disclosure under section 552.029 of the Government Code. *See id.* § 508.313(f).

Because this ruling requires the board to withhold all of the requested information, the requestor can appeal this decision by suing the board. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ). The requestor may also file a complaint with the district or county attorney. Gov't Code § 552.3215(e).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH/RWP/ljp

Ref: ID# 139342

Encl. Submitted documents

cc: Mr. Jim Thompson
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(w/o enclosures)