



TEXAS DEPARTMENT OF CRIMINAL JUSTICE

P.O. Box 99 • Huntsville, Texas 77342-0099

James A. Collins
Executive Director

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Opinion Committee

FILE # MI-28038-94

I.D.# 28038

RQ-725

Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711

Re: Request for Opinion on the Meaning of "Person", Section 552.001, Open Records Act
LA94-0630-0399

Dear General Morales:

The Texas Department of Criminal Justice requests your opinion on whether an inmate incarcerated in any correctional facility in the Texas Department of Criminal Justice is a "person" within the meaning of the Open Records Act, Section 552.001, et seq., Texas Government Code.

The policy set forth in Section 552.001 is to assure that each **person** have available at all times "complete information about the affairs of government and official acts of public officials and employees". The reasoning is clear: the public pays taxes to support public officials to manage their affairs. They create these instruments by voting and by paying taxes. Therefore, the first element in the definition of "person" is that such a person is a citizen who votes and pays taxes. Because of this, he is entitled to complete information from state agencies.

"The people insist on retaining control over the instruments they have created". Section 552.001. Because a citizen pays taxes and has an interest in the quality of services he receives, he has a right to retain control over the agencies he creates. Therefore, the definition of "person" under the Open Records Act contains as an element the right to control a public agency because the person created it.

Furthermore, a person under the Open Records Act is a beneficiary of the public agencies he creates. Therefore, each citizen and the public as a whole has the right to determine if the services provided are adequate and fair. Therefore, the definition of "person" for purposes of the Open Records Act is a citizen who receives the benefits of the public body because he has paid for them and created them.

A convicted felon incarcerated in the Texas Department of Criminal Justice does not meet any of the above criteria for the definition of "person" under the Open Records Act. Inmates are not productive citizens. Not only are they not gainfully employed, they are supported by productive citizens of the state, costing the public approximately \$45.70 a day (\$16,680 per year). Furthermore, they are not the beneficiaries of public bodies while they are incarcerated for their crimes. Finally, convicted felons have committed crimes against the public. Convicted felons have neither a fiscal nor a moral right to "complete information about the affairs of government and official acts of public officials and employees". They should have no right to control public bodies which govern the lives of law-abiding, productive citizens. The result of including convicted felons in the definition of "person" is to (1) give convicted felons control over public bodies created by their victims and (2) impair the public safety by providing public records instead of prison beds for murderers, rapists and thieves.

The matter becomes even more serious upon examination of what it is costing the victims of the convicted felon for him to retain the right of total access to public records. The cost to the Attorney General's office to respond to decision requests from TDCJ to protect information from inmates must be considerable. In 1994, TDCJ has requested 45 records decisions from the Attorney General Opinion Committee solely to protect employee records from inmates. Each of these decisions must be responded to individually by an Assistant Attorney General. In addition, the current estimated cost to the state prison budget for 1994 is \$193,529 to respond to inmate requests. When the inmate population increases in 1995, the dollar cost will increase proportionately. The dollar cost is not a completely accurate estimate of the true expense to the state of inmate Open Records requests. The figure does not include the time a correctional officer spends guarding an inmate who chooses to review his file rather than paying for copies. If it takes the inmate four hours to view his file, that is four hours the correctional officer could have been maintaining the safety and security of the institution. Furthermore, the dollar figure does not reveal the total wastefulness of many of these requests. For example, one inmate requested personnel information on 108 employees at one time. The quote below from the Chief of Unit Classification at one of the prisons accurately reflects the burden of Open Records Act responses to inmates:

"As the demands for records under the Open Records Act continues to grow, I can see it requiring a staffed department in itself. Prior surveys I have conducted and have a record of show that there has been a substantial increase in the number of requests per month and I can see the time factor being unbearable in the near future and case managers having to be pulled from their assigned caseload assignments to handle these requests. This leaves a serious problem in primary job duties falling short of compliance. The time an inmate spends reviewing a folder has varied from 20 minutes to 4 hours depending on the inmate. Other inmates continuously put in a request to review the same records over and over again on a regular basis. In addition to the processing, screening and review time, there is a copy time which has varied depending on the contents of the folder or specific copies requested.

The biggest and most serious issue is that the time actually spent processing a request cannot truly be shown in actual minutes or hours due to the work time not being consistent but rather broken up in different steps and in different processes which actually take up more time than that actually shown or recorded. The constant interruptions due to the daily operations of a department and having to restart on each request depending on the step each request is in (which could be up to eight steps) adds up and sometimes actually takes up to a three week period to complete and close out. This takes its toll on a department in staying in compliance with required duties other than Open Records. Any assistance you can provide in setting a time limit for review time, reducing the times an inmate can request to review his records and establishing an Open Records Department will be greatly appreciated."

The Attorney General has just recently issued an opinion in ORD94-340 that the employee disciplinarys requested should be released to the inmate. This ruling has the potential of becoming a nightmare. While the public has the right to this information, it does not seem logical to allow such information to become accessible to inmates. As the word spreads throughout the criminal population, the requests for employee personnel information, agency policies and records will continue to grow. Additional personnel will have to be hired to do nothing but respond to requests for such information. The agency does not believe the public intends the money for prison funding to be spent to satisfy the curiosities and potential crimes of the criminals they have removed from society.

Another major consideration is what convicted felons ask for and what they do with the records. Inmates can utilize disciplinary information to harass and intimidate employees as well as undermining institutional security. When employee morale is shaken by threats, they may be less effective in enforcing inmate discipline. The security of the institution, other employees and the agency is undermined. They can find out the names of the schools that the employees' children attend. They can use the information to send love letters and other inappropriate missives to the guards. Part of the definition of "person" for the Open Records Act should be "law-abiding". Convicted felons are not law-abiding.

To exclude TDCJ convicted felons from the definition of "person" would not require the Attorney General to exclude other institutionalized, non-tax paying individuals from the Act. MHMR patients do not pay taxes, and they are institutionalized, but they did not commit crimes and they did not choose the circumstances which led to their institutionalization. The difference between institutionalization and incarceration is a difference in personal responsibility. If a person chooses to commit a crime against the public, he should not retain the privileges of the public. He should especially not retain privileges which allow him to further victimize that public.

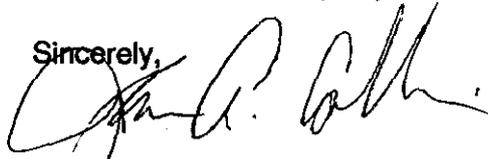
A convicted felon has reduced constitutional rights, and his right to rummage at will through the employee files, get the names of the schools where citizens' children go to first grade, access the Social Security numbers of non-TDCJ employees, and other critical personal information should be reduced by his conscious decision to commit a crime, including violent crimes, for which he is sent to prison. Inmates rights are controlled by constitutional law, which balances the diminished rights of inmates against legitimate penological interest. There are numerous documents available to the inmate concerning his own incarceration, including classification, medical and operational information. A federally certified grievance procedure that has passed

judicial scrutiny is in place to respond to allegations of mistreatment. Inmates are protected by the Americans with Disabilities Act and other federal schemes, including prohibitions against race and sex discrimination. Actions under 42 U.S.C. §1983, habeas corpus writs, access to courts, and Inmate Legal Services are all available to inmates to protect their rights. It is not the inmates' duty to enforce the safety and security of the institution by viewing TDCJ records. The Internal Affairs Division as well as Institutional Division management enforce employee behavior through internal investigations and appropriate enforcement of sanctions. The Open Records Act is a legislative plan to protect the public. It offends that purpose to extend the Act's protection to convicted felons who are maintained at the expense of the public, who have victimized that public, and who have numerous other protections available to them to protect their rights as prisoners.

Excluding convicted felons from the definition of "person" under the Open Records Act will not deprive the public of information about prisoners or the prisons. Although there is some information about prisoners that is confidential as to the public, it is also confidential as to other prisoners. The press, legislators and the public will continue to have access to any information to which they already have access. They will benefit, however, from improved responses to their requests from the agency once it is freed of the burden of responding to unlimited prisoner requests.

Thank you for your kind consideration of this matter. If you have any questions or need further information or briefing on this request, please do not hesitate to contact Cynthia N. Milne, TDCJ General Counsel, at (409) 294-2140.

Sincerely,



JAMES A. COLLINS
Executive Director

c: Carl Reynolds
Wayne Scott
Melinda Bozarth
Rusty Hubbarth
Todd Jermstad
Leonard Peck
American Federation of State, County and Municipal Employees, AFL-CIO
815 Brazos, Suite 500 - Austin, TX 78701

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