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Mr. R. K. Procnier
Director
Texas Department of Corrections
P. O. Box 99
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Open Records Decision No. 430

Re: Whether documents relating to polygraph examinations of an inmate of the Texas Department of Corrections are excepted from disclosure under the Open Records Act

Dear Mr. Procnier:

A newspaper has asked the Texas Department of Corrections [hereinafter TDC] to release the following information concerning an inmate:

1. Official results and interpretations of polygraph examination [administered to this inmate on a particular occasion]. This information would include the written/printed results of the full examination, including all questions asked and those marked as control questions; who administered the examination and under whose authority; where the polygraph test was administered and when; the cost of the examination and who paid for it; and all memorandums, letters, and other correspondence leading to [this] polygraph examination.

2. [The inmate's] TDC visitors lists, both regular and special, from his incarceration on October 28, 1983, to the present. The information being sought here is [the inmate's] official visitors list and the list of any visitors who have visited him but are not on [the inmate's] official, standing, and approved visitors lists.

You contend that the visitors lists are within section 3(a)(1) of the Open Records Act, article 6252-17a, V.T.C.S. You also contend that the department "cannot release [the inmate's polygraph examination information] except in circumstances consistent with" article 4413(29cc), V.T.C.S.

Section 19A of article 4413(29cc) provides in relevant part:

(b) Except as provided by Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination.

(c) A licensed polygraph examiner, licensed trainee, or employee of a licensed polygraph examiner may disclose information acquired from a polygraph examination to:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person, firm, corporation, partnership, business entity, or governmental agency that requested the examination;

(3) members or their agents of governmental agencies such as federal, state, county, or municipal agencies that license, supervise, or control the activities of polygraph examiners;

(4) other polygraph examiners in private consultation, all of whom will adhere to this section; or

(5) others as may be required by due process of law.

(d) A person for whom a polygraph examination is conducted or an employee of the person may disclose information acquired from the examination to a person described by Subdivisions (1) through (5) of Subsection (c) of this section.

In a letter supplementing your request letter, you made the following statements concerning the polygraph information:

On or about May 1, 1984, [a named inmate] was the subject of a polygraph examination, which was given by an employee of the Texas Department of Corrections, such examination occurring at the request of [a named attorney]. There are no documents on the cost of the examination; thus it would appear to have been performed at TDC expense. There is no word of a special TDC interest in the matter. TDC was merely in the role of the polygraph operator. Thus there are no

TDC documents preceding or following the examination.

. . . .

While it remains TDC's position that the statute covers the whole examiner/examinee relationship, the department would further suggest that the documents or facts leading to 'information acquired from a polygraph examination' or 'the results of the polygraph examination' are confidential because of the expectation of the parties to the examination. . . . As I read the statute, the relationship between a polygraph examiner and examinee is intended to be voluntary and confidential. A third party may be foremost in the examinee's mind, but the statute places the control over the examination in the hands of the examinee. He participates at will and may withdraw at will; he may control and limit the distribution of the results. The statute recognizes the special standing of the third party when the party is paying for the examination, but the control of the examinee remains central.

While the statute is not explicit on the matter, it would appear that the parties generally regard the whole examination as confidential. In the context of TDC investigations and in examinations performed in the general community, it is the expectation of the parties that the whole matter is confidential. An examiner in the general community would decline to acknowledge the occurrence of an examination (absent an appropriate release or court order), much less the subject or results. . . .

TDC's further sense is that the holder of the confidence and the controller of the distribution of information on the matter is [the inmate]. Given leave by [the inmate], TDC would be pleased to share the requested records with the [requestor].

TDC believes that the name of the examiner ought to be confidential as part of the confidential fabric of the relationship. However, it is conceded that the cat is already partially out of the bag and the name of the examiner probably does not offend a concern of confidence not already completely before the press.

For the reasons stated above, the questions, tape, and analysis are clearly central to the confidential relationship, and their release should require approval by [the inmate/examinee].

Open Records Decision No. 316 (1982) held that the city of Pasadena could withhold "the notes, records and examination records of the polygraph examination given [to a certain Pasadena police officer] for employment" because the city was a "person for whom a polygraph examination is conducted" within the meaning of section 19A(b) and could therefore release those records only to those persons specified in section 19A(c). Here, the information furnished by both the requestor and the department convinces us that the department is also a "person for whom a polygraph examination is conducted." Because such persons may "disclose information acquired from the examination" only to persons specified in paragraph (c), and because this requestor is not among those persons, we conclude that the department may withhold this information from this requestor. The remaining question is: how much of the requested information is protected under section 19A?

In this instance the requestor has asked for "all memorandums, letters, and other correspondence leading to this polygraph examination." Your letter states that no such materials exist. The Open Records Act applies only to information in existence and does not require governmental bodies to prepare new information. Open Records Decision No. 342 (1982). The requestor also wishes to know

who administered the examination and under whose authority; where the polygraph test was administered and when; the cost of the examination and who paid for it. . . .

Your letter provides much of this information, which it characterizes as "matters of public knowledge": it reveals the date on which the test was administered and indicates that TDC authorized and bore the expense of the test. Your letter further indicates that the name of the examiner is "before the press," and this obviates the need for us to decide whether this information is within the ambit of section 19A. Thus, we need decide only whether the phrase "information acquired from a polygraph examination" embraces

the written/printed results of the full examination, including all questions asked and those marked as control questions; . . . where the polygraph test was administered . . . [and] the cost of the examination. . . .

This phrase is not defined in the act. The legislative history of section 19A, enacted in 1981, Acts 1981, 67th Leg., ch. 768, at 2872, sheds no light on its meaning. The other provisions of article 4413(29cc) furnish no help. See Merchants Fast Motor Lines, Inc. v.

Railroad Commission of Texas, 573 S.W.2d 502 (Tex. 1978) (legislative intent to be determined by examining entire act). The only way to decide what this phrase embraces, therefore, is to attempt to determine the intent of the legislature which enacted it. See Ex parte Roloff, 510 S.W.2d 913 (Tex. 1974) (duty of court construing statute to ascertain legislative intent).

We have carefully considered your arguments concerning the confidential nature of polygraph examinations, and we find them persuasive. In our opinion, they most likely echo the sentiments of the legislature which enacted section 19A. With this in mind, we conclude that "the written/printed results of the full examination, including all questions asked and those marked as control questions" are protected from required disclosure. On its face this information appears to be available only from the polygraph examination itself, and we believe it is the kind of information that the legislature intended to protect. On the other hand, we conclude that information which reveals the location and cost of the examination is not protected by section 19A. This information would be available from sources other than the polygraph examination; in our opinion, moreover, there is no reason to conclude that the legislature which enacted section 19A intended to protect this information from disclosure.

In your request letter, you advanced the following argument concerning the visitors lists:

The second request for visitor lists and logs is easily resolved. The principles controlling are found in Open Records Decision No. 185, relating to correspondence lists. In that opinion, the attorney general determined that, while TDC had a legitimate interest in monitoring and controlling the correspondence of its inmates, the public interest in knowledge about inmate activities was outweighed by correspondent's interest in not being in the public light by being correspondents. That is, a First Amendment right of those who correspond with inmates made lists of prison[er]s who correspond with inmates 'excepted under Section 3(a)(1) of the Open Records Act, as information deemed confidential by constitutional law.' Open Records Decision No. 185 at 2. It is submitted that precisely the same concerns affect persons whose contact with inmates is oral and not in writing.

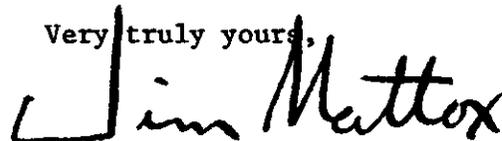
Moreover, it is urged that, while Open Records Decision No. 185 talks about the rights of people who correspond with inmates, it is difficult to distinguish between the interest in

confidentiality of a person who corresponds (or visits) with an inmate and the interest of an inmate who corresponds (or visits with) a person.

Before we may conclude that the portion of section 3(a)(1) which excepts information deemed confidential by constitutional law applies to this information, we must establish that the release of that information would impair some constitutional right. Open Records Decision No. 185 (1978) found such a right, holding that outsiders have a First Amendment right to correspond with inmates that would be threatened if their names were released. Open Records Decision No. 428 (1985) also found such a right, concluding that inmates have a First Amendment right to correspond that would be infringed if their names were released. The question in this instance is whether the release of an inmate's visitors lists would violate any constitutional right.

Recent cases establish that inmates have at least a qualified constitutional right to visit with outsiders and suggest that the converse is also true. See, e.g., Pell v. Procunier, 417 U.S. 817 (1974); Lynott v. Henderson, 610 F.2d 340 (5th Cir. 1980). In our opinion, the release of visitors lists could compromise those rights. Although the release of these lists to this particular requestor might not cause any harm, if this requestor can obtain the list, anyone else can as well. Open Records Decision Nos. 428 and 185 discussed possible harm to an inmate if the knowledge that he had corresponded with particular people fell into the wrong hands and to outsiders if their names became public. Similar results could occur if it became known that inmates had visited with certain people. We therefore conclude that an inmate's visitors lists are excepted under section 3(a)(1) as information deemed confidential by constitutional law.

Very truly yours,



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