



July 13, 2001

Ms. Laura McElroy  
General Counsel  
State of Texas Board of Pardons and Paroles  
P.O. Box 13401  
Austin, Texas 78711-3401

OR2001-3026

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# 149391.

The Board of Pardons and Paroles (the "board") received a request for "the entire [board] files on executed inmates Karla Faye Tucker and Gary Graham." You inform us that 10 categories of responsive information are being made available to the requestor, but claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

You have submitted the following information to this office that you contend is responsive to the request: Tab A, Department of Public Safety criminal history information; Tab B, law enforcement offense reports; Tab C, execution summaries and prison records; Tab D, recommendations from trial officials; Tab E, letters from victims and supporters; Tab F, letters from inmate and supporters; Tab G, general correspondence from the public; Tab H,

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<sup>1</sup>We assume that the "representative samples" of records submitted to this office are 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.

attorney memoranda to the board; and Tab I, memoranda from Governor's general counsel to Governor Richards dated November 10, 1993. You assert that all of the responsive information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 508.313(a) of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes such as section 508.313. 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;<sup>2</sup> or

(3) a person directly identified in any proposed plan of release for an inmate.

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

By its terms, section 508.313(a)(1) makes confidential information concerning inmates of the Texas Department of Criminal Justice's ("TDCJ") institutional division who are subject to parole, release to mandatory supervision, or executive clemency. The inmates whose information has been requested in this case were inmates subject to executive clemency. The request for information was received by the board, however, after the inmates in question were executed. 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

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<sup>2</sup>"Releasee" means a person released on parole or to mandatory supervision. Gov't Code § 508.001.

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 in this case was obtained and maintained by the board, it related to inmates 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 inmates. Furthermore, the confidentiality provision appears to protect more than the inmates' 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 requested information is confidential under section 508.313 of the Government Code, regardless of the fact that the inmates in question were deceased at the time the records request was made. As we find that none of the release provisions of section 508.313 are applicable, the requested information must be withheld from disclosure under section 552.101. As we resolve your request under section 552.101, we need not address your other raised exceptions.

Finally, we note that you request that this office issue a previous determination to the board under section 552.301(a) of the Government Code with regard to the following six categories of information: 1) Department of Public Safety criminal history information; 2) execution summaries and prison records; 3) recommendations from trial officials; 4) letters from victims and supporters; 5) letters from inmate and supporters; and 6) general correspondence from the public. Therefore, as per your request, this letter ruling shall serve as a previous determination under section 552.301(a) that the six categories of information listed above, when obtained and maintained by the board in relation to a releasee, an inmate subject to release on parole, release to mandatory supervision, or executive clemency, or a person directly identified in any proposed plan of release for an inmate, are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 508.313(a) of the Government Code. Accordingly, so long as the elements of law, fact and circumstances do not change so as to no longer support the findings set forth above, the board need not ask for a decision from this office again with respect to the above categories of information requested from the board under the Public Information Act. *See* Open Records Decision No. 673 at 7 (2001). Please note, however, that this letter ruling does not affect any right of access to the above categories of information 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).

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,

A handwritten signature in cursive script that reads "Michael A. Pearle".

Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 149391

Enc. Submitted documents

c: Mr. Lucius Lomax  
P.O. Box 547  
Austin, Texas 78767  
(w/o enclosures)