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Opinion Committee

TEXAS DEPARTMENT OF CRIMINAL JUSTICE

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James A. Lynaugh
Executive Director

James A. Collins
Director June 18, 1993

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I.D.# ~~20832~~ 29886
RQ-753

Honorable Dan Morales
Attorney General of Texas
Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

re: Record Request of Gary M. Hosea; TDCJ OR93-0504-0182; AG ID# 20183

Dear General Morales:

This is our argument for believing that certain materials are excepted from release to requestor Gary Hosea.

This is the first of a rush of what I will call our Gilbreath requests. Mr. Hosea and a number of other competitors for positions within the agency are requesting information about promotion/hiring processes that did not result in their selection.

We have requested opinions on several of them. Since the issues are essentially identical in all of them, we will consolidate our argument and use this request as our argument and as our exemplar of the records at issue.

Mr. Hosea has requested a number of documents which he identifies by form number. Basically these documents set forth the qualifications of individual competitors for the specific position. Other documents requested contain the scores assigned by individual raters to the different competitors. An additional document contains the questions asked by the promotion board members of the individual candidates. Mr. Hosea doesn't request this document, but others do, and in the interest of simplicity, I will discuss our concerns about releasing the questions and other documents in this argument.

I.

Our earlier correspondence about this particular request is found in Attachment A.

A set of exemplar promotion packet documents are found in Attachment B. The copies are two-sided, but references to pages are in fact to sheet number. (You won't need to distinguish between specific front and back pages.)

Final copy received 6/18/93

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II.

Before you can evaluate this open records request, it might help you to have some idea of the procedural context in which these documents are found. The following description is accurate in general terms, but not necessarily in its details.

Neither state nor federal law mandate any specific procedure for evaluating applications for specific positions and for selecting the successful applicants.

Since at least the late 1960's, the Texas prisons have made most promotional decisions using a promotion board model. (It's called a promotion board because in most cases selection is also promotion for the successful applicant. In many cases, from the applicant's point of view, selection can also mean being hired, moved laterally or voluntarily demoted.)

One of the characteristics of our system is that boards fill specific positions. To use a specific position as an example, the building lieutenant is an important mid-level manager in an individual prison. His general function is management of the security force in the building and within the compound. A separate board will make the selection for each building lieutenant vacancy. We have at least 3 building lieutenants in each regular unit and over forty such units. (This is all an extreme oversimplification, but for these purposes, the compound is that part of the prison that is inside the walls/security perimeter of the prison. It would include inmate housing, recreational facilities and work areas that are in that area. Agricultural operations and other specialized services outside the security perimeter may have their own uniformed security management.)

A promotion board consists of a number of individuals from different organizations who have stakes or expertise in the selection being made. The selection of board members depends heavily on the skills associated with the job and the organizational place of the specific assignment.

The board process begins with screening applications for the position to identify qualified applicants. Boards will then go through a controlled interview of qualified applicants, which will include a review of their written application packet. Each screened and qualified applicant will be interviewed separately by the committee and asked a series of questions which have been selected to identify the applicants' experience and qualifications for the position. The same questions are used for each and every applicant who goes before the board. Each board member votes separately for each applicant on several numerical scales. The points are totaled for each applicant and the applicants are then referred in rank order to the selecting authority. The selecting authority is not necessarily obligated to accept the top scoring candidate, but must be ready to provide a good business-related reason for not making such a selection.

Another historical feature of the system is that the votes of individual board members have always been rather closely held. Competitors, outsiders, and even members of the board are often not made aware of individual votes and totals. The primary reason for that has been a sense that publicity discourages candor. The glare of publicity decreases the integrity of the system.

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III.

Now let me just provide you with just an overview of the material found in Attachment B, which are all the documents associated with a particular selection. The cover sheet simply notes all the documents associated with the packet and identifies the selected applicant. (Since he was then and is now an employee, we would ordinarily not make the social security number available to a member of the general public, consistent with Article 6252-17a, Section 3(a)(17). The same rule applies to other Section 3(a)(17) information found throughout these documents, generally Social Security Numbers, home addresses and telephone numbers. Because the statute is clear, we make no special argument about the Section 3(a)(7) information.)

Pages 1 and 2 are clearly public. Page 3 has a substantial amount of deleteable material, consistent with Section 3(a)(17), but the job description information is releasable.

Pages 8-19 are clearly public and contain information about the job which is being posted and also document the form of notice that was distributed throughout the system.

Pages 19-101 contain applications. The standards for release for any single application be the same for all of them. We believe these to be excepted from release, except for the names of the applicants, which are clearly public. Please note that some of the forms also include screening information which reflects whether or not the particular person submitting an application was deemed to have qualified for further consideration.

Page 102 contains the instruction for the technical expert used in screening application packets. It is clearly public, as are pages 103 and 104, containing the notice of the schedule for the interviews.

Page 105, which we believe to be excepted, contains the individual and total point scores and rank orders of the candidates.

Page 106, clearly available to the public, provides EEO demographics and identifications for the members of the selection board.

Pages 107-109 contain the board members' questions, and is still excepted.

Page 110 explains the scoring scale and is clearly public.

Pages 111-139 contain the individual score sheets for each board member for each applicant. We believe these to be excepted for the reasons stated below.

Pages 140-153 contain the EEO applicant flow information, in general (except for things like social security number) their contents are clearly public.

The announcement teletype, clearly releasable, is found on page 155.

Pages 152 and 156 contain handicap and ADA information, which we believe are excepted.

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IV.

These sections will contain our general open records concerns. (Page cites are to Attachment B.)

First, consistent with OR91-087, we believe that the technical questions (see pages 107-109) are excepted from release by the provisions of Article 6252-17a, Section 3(a)(22), Test Items Developed by Governmental Bodies. While there is some change in the choice of questions from board to board, these questions are reused from board to board. As in OR91-087, release of questions compromises the integrity of the process by making it easier for competitors for specific positions to prepare for the testing in a way that hides rather than exposes their real knowledge about the job. The practical consequence is a wasteful increase in the cost of preparing questions (since new questions need to be developed) and a tendency to develop new questions that are sufficiently obscure that they may not actually give candidates an opportunity to show what they know about the job, but rather predict how well they would do playing Trivial Pursuit.

We believe the exception squarely covers the questions and thereby excepts them. We are a governmental body and the questions are test items.

V.

And now to our heartburn issue, the board member evaluations, rank orders and total scores. Page 105 contains the point score for each reviewer for each applicant totaled and rank ordered for the top three scores. Those point scores in turn are derived from the individual votes and evaluations found at pages 111-139.

Gilbreath has raised fundamental questions about whether Article 6252-17a, Section 3(a)(11) ~~excepts such information from release to members of the general public.~~

We believe it does. We can locate no specific authority for the proposition, but we believe that this kind of candid, internal evaluation and opinion is and certainly ought to be privileged, except in litigation in which the process of selecting someone for a particular position is the gravamen of the complaint. You might wish to discuss with your litigators about how protectable this information might be in litigation.

Next, we believe the material is excepted consistent with Section 3(a)(8), the Law Enforcement exception.

The security of a prison has long been recognized as an interest protected by the Law Enforcement exception. We are concerned that release of this kind of information would, for the reasons stated above, greatly complicate prison administration, and would in that sense be adverse to the safety and security of the institution.

The first problem for individual board members is that those who did not vote favorably for their friends may find themselves needing new friends. Even with over 20,000 employees, the Texas

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prisons often take the shape of a series of small communities and people competing for specific positions are likely to know people on the board, either because they are former supervisors or coworkers or personal friends, or some combination thereof. People linked to them often take it personally if board members do not give them extra points. Similarly, strangers and unsuccessful friends are likely to cry foul when a board member rates an associate high. The emotional task can become especially complex when the board member is closely associated with several of the applicants who may also may be close associates with each other.

The practical consequences of making the individual votes and total votes public is that whole new dimensions of strife and rancor are unleashed. And the effectiveness of the system as an honest and fair way to fill positions is permanently impaired.

First, board members are likely to vote less honestly if they know their votes are available to the whole world. The most likely consequence will be that board members will vote everyone identically and only rarely vary from the middle score.

Second, individual employees may become less enthusiastic about sitting on boards.

Third, there will be an increase in staff rancor and complaint. Persons seeking promotion but not receiving it (the majority of them) will micro-grieve the selection process. The level of personal animosity between competitors and board members and each other will increase.

These requests are all by disappointed competitors. As a matter of law, insofar as we can tell, they enjoy no right of special access to any of the information contained in these packets, except for that which they provided themselves. They have the same claims as members of the general public, neither more nor less.

That logic also applies to the point scores and rank orders. That is, as we see it, no individual contender enjoys a special right of access to his point scores, i.e., those evaluations of him made by the board members. If Smith can see the scores for Smith, he can see those of everyone else.

But disappointed contenders are not the only members of the general public who might be curious. Inmates may also be interested in these matters and we are concerned about the potential for mind tripping and psychological manipulation on the part of canny inmates using this information. ("Your mother always liked your brother more than she loved you." "Your warden obviously prefers Smith over you." "You truly are incompetent: out of five contenders you came in last.") See e.g. OR93-237 on the abuse by one spectacular inmate of ordinarily public information.

VI.

That then takes us to the question of objective qualifications listed in the applications. See, e.g., pages 3 through 7, and pages 36 through 49.

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In the special case of employees of the TDCJ we believe that this kind of information about past employment, skills, and education is excepted from release under Section 3(a)(8) as Law Enforcement Information because it is susceptible to severe misuse by inmates and their friends should they come across it, for the mind manipulating reasons described above. (We do not take the position that these particular requestors represent that kind of a threat to security. Unfortunately, the Open Record Act's notions of uniform treatment make application of Law Enforcement exception to specific categories of individuals an exceedingly artful matter.)

VII.

We believe that information about physical handicaps and limitations, or for that matter even denying their existence, is excepted from release under the provisions of both Section 3(a)(2), Extremely Intrusive Information Found in Personnel Files and also Section 3(a)(1), Private and Confidential Information. Any guidance you can provide on handicap and disability information would be extremely valuable to us, and would have an application to other agencies as well whose personnel files must address similar issues.

We believe that the self identification of reportable handicap at page 152 may present some serious problem consistent with Section 3(a)(1) and Section 3(a)(2), in that Handicap Information is likely to be extremely personal.

We are also concerned about the material on page 156, which impacts ADA claims. See 42 U.S.C., Section 12101 et seq. Must we release these kinds of forms and the attachment that would follow if the applicant claims a need for special accommodation pursuant to ADA (The Americans With Disabilities Act)? Or if he does not claim a disability?

We believe that any information on handicaps or on their absence is inherently intrusive into private matters. Releasing the absence of handicaps means that silence on the absence of handicaps shows the presence of handicaps.

VIII.

One further question.

As we read JM114, barriers against requiring requestors to bear the cost of removing excepted material from documents before release hinged on the notion that the material excepted was exempted at the discretion of the governmental body. Material excepted under Section 3(a)(17)(B) is not discretionary. It is mandatory. We believe that we can require requestors to bear the costs of excepting such material. Can we?

IX.

For the above mentioned reasons, we believe the information contained in these files is excepted from release to the general public. First, we believe that the questions used in the interviews are protected by Section 3(a)(22). Next, we believe that the point scores, either for individual

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evaluators or in aggregate, and rank order are excepted from release. We believe (or at least hope) that Section 3(a)(11) still applies to this kind of information. Additionally, we believe that Section 3(a)(8), Law Enforcement Information, excepts release of this information to employees, competitors or generic members of the general public and we most assuredly believe that it prohibits release to prison inmates.

We also believe that Section 3(a)(8) also excepts release of information about the work experience and credentials of individual applicants to members of the general public, largely for fear that some of that information will be available either directly or indirectly to prison inmates who can use it in a way that is adverse to the security and safety of the institution, mainly by playing mind games on our employees.

We believe that handicap and ADA information is excepted by Section 3(a)(1) and Section 3(a)(2).

Finally, we believe that requestors must bear the cost of removing material excepted under Section 3(a)(17).

Sincerely,



LEONARD W. PECK, JR.
Assistant General Counsel
Legal Affairs Division

LWP/bb

cc: Art Mosley, Assistant Director
Personnel and Training