



# TEXAS DEPARTMENT OF CRIMINAL JUSTICE

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

James A. Collins  
Executive Director

October 24, 1994

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

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RQ-779

re: Record Request of Bob Bartlett, KTAB-TV; TDCJ OR94-0807-0506; AG OR94-650

Dear General Morales:

This is our argument as to why at least some of the material requested by Bob Bartlett, News Director for KTAB-TV in Abilene, Texas is excepted from release to him.

On August 4, 1994, Mr. Bartlett made a written request to TDCJ's Internal Affairs Division ("IAD") in which he requested "complete offense reports from the July 1994 investigation into allegations of misconduct by employees of the French Robertson Unit -- TDCJ, Abilene, Texas, specifically pertaining to civil rights violations and/or assaults on inmates by employees." His interest was undoubtedly triggered by printed reports that the Warden of the Robertson Unit had disciplined a number of unit employees for serious violations of procedure which also appeared to involve violations of the rights of inmates. Since the request was sent to IAD and based on earlier telephone conversation with him, we presume that the request is directed at the IAD investigative reports about the same matters. At the time of the request, the reports did not exist (the IAD investigations had just begun) and we held back from briefing the matter in hopes that, if we waited long enough, the investigations would be sufficiently resolved that we could brief on the substance of the reports. As we will discuss below, the investigations are still underway.

Attachment A contains our earlier correspondence about the matter.

Attachment B contains case opening sheets for the investigations.

Attachment C contains a status report on one of the investigations, which should give you an idea of the contents of the reports, when they are complete.

I.

Except as otherwise stated, we believe that much of the information requested by Mr. Bartlett is excepted from release to him consistent with Texas Government Code, Chapter 552, in particular:

Section 552.101, Confidential Information;  
Section 552.107, Certain Legal Matters (*Ruiz*); and,  
Section 552.108, Certain Law Enforcement Records.

Additionally, strictly speaking, the documents he requested did not exist at the time of the request and do not yet exist.

We also note that the Section 552.101 exception is not waived, even by failure to assert or failure to timely assert.

II.

Let me begin with some background about our procedures in investigations of this type. In this particular matter, the warden became aware of allegations of a rash of acts by officers that represented serious violations of policy and law. His investigation showed that many of the allegations were substantially true. In TDCJ, the instinctive response of managers to allegations of serious misconduct is to refer them to IAD for evaluation and, if appropriate, investigation. In many cases, there is not enough information to justify acting and managers simply await the close of the investigation before acting, especially since few investigations result in findings against officers. However, in this case, the warden had enough information about at least some of the allegations to act immediately, and he did so, initiating personnel discipline against several of his officers. He also referred the allegations against the officers to IAD, which is currently investigating the matter.

At most recent report, the investigations are currently being reviewed by the Special Prosecutor's office, which is considering whether or not to file charges. No decision either to prosecute or not to prosecute has been made. From their initiation, these investigations have been seen as criminal in nature. While the investigating is substantially done, neither the investigations nor the reports are complete. (The Special Prosecutor's office often becomes involved in our investigations before they are complete.)

The Internal Affairs Division has a variety of investigative roles, among them criminal investigations, for which its officers have peace officer status. See, Texas Govt. Code, Section 494.009. In that role it functions as a regular police investigative agency.

Completion of the process may have a number of consequences for each of the investigations: (1) a decision may be made not to prosecute, either by the prosecutor or by the grand jury; (2) or a

decision may be made to prosecute on criminal charges; (3) and/or a decision may be made that further employee discipline is appropriate.

### III.

Now, to discuss the investigations themselves.

#### **Active Criminal Investigation**

These are active criminal investigations into allegations of violations of Texas Penal Code, Section 39.021, which, if proven, could result in a felony prosecution and conviction. They were initiated as criminal investigations. The case opening sheets use numbers IAD reserves for criminal investigations and each is on a form styled "criminal case information worksheet." Attachment B contains the case opening sheets for the pertinent investigations, 8 investigations directed at 10 officers. This is not "blotter sheet" information nor or they offense reports as generally understood. See, *Heard v. Houston Post Co.*, 684 S.W.2d 210 and *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177. The employees have not been arrested. The employees are uncharged suspects.

Because these are active criminal investigations, it is the agency's position that all the documents associated with these investigations, including the case opening sheets (including the names of the accused employees and especially the victim inmates), and the associated notes and records are excepted from release consistent with the provisions of Texas Govt. Code, Section 552.108, Law Enforcement Records.

It is the agency's position that the status of the investigations as active criminal investigations is itself a compelling reason not to release anything about these investigations at this time.

Release of any information about these investigations may compromise them and make future prosecution more difficult. Releasing either the general theme of an investigation or the details (e.g., witness statements) will prejudice the investigation by, e.g., suggesting facts to witnesses whose stories have not yet been secured, or assisting those who wish to frustrate the investigation in knowing what evidence to hide or manufacture.

Finally, if these investigations should result in prosecutions, there is the risk that the defendants' right to fair trials will be prejudiced by pretrial publicity about the cases. No one who has followed O.

J. Simpson's trial can be unaware of the challenges presented by excessive publicity, even if the information released is accurate.

Attachment C contains a partial summary of one of the investigations. It is not a complete report, but it suggests the contents of the complete report.

The information in Attachment B and Attachment C is the subject of the exception requested by this agency and is not being provided to the requestor.

#### IV.

IAD investigations contain many common ingredients. It might make sense to discuss them, because these reports are likely to contain most of those discussed below

##### **Officer statements**

These investigations will include the statements of employee witnesses. While in most cases the statements of officers about their work are matters of public record, since these are presently criminal investigations, it is the agency's position that the identity and statements of employees are excepted from release consistent with the provisions of Texas Govt. Code, Sections 552.101 and 552.108, consistent with the logic customarily applied to inmate witness statements. Since these are criminal investigations, officer witnesses bear the same risks of harassment and retaliation as other witnesses in criminal matters or as inmate witnesses. See, discussion on inmate statements, below.

##### **Inmate statements**

The agency's position is that the identities of inmate complainants, victims and witnesses are excepted consistent with the provisions of Section 552.101, because we believe that release to the public of the identities of these inmates could expose them to harassment and retaliation from officers who might be friends of the officers who are involved in these transactions, inmates who have similar regards for the involved officers, and inmates who are merely critical of other inmates who spoke out of turn. See e.g., OR93-205 (1993); (Creel, TDCJ OR93-015-0030).

For similar reasons, the agency's position is that the same material is excepted under the provisions of Section 552.108, Law Enforcement Information, because identification of complainants and witnesses to the general public could expose them to harassment and retaliation under the same general theory which drives the Section 552.101 concern. A further reason for protecting these identities is the potential chilling effect that release of that information would have to future inmates who wished to complain or inform about something, given the potential for harassment and retaliation. If we too publicly identify complaining inmates, the hazard that their complaints might become public might discourage future complainants. When the word got out that the filing of complaints or the making of witness statements turned one into a walking lightning rod, few will be foolish enough to make complaints except when they are profoundly serious. Our interest as managers is to identify problems and official misconduct at the lowest possible level of severity and deal with it at the lowest and least severe level.

**Inmate identities**

Additionally, information which would identify specific inmates as participants in these investigations as victims or witnesses is also excepted from release consistent with Texas Govt. Code, Section 552.107, Certain Legal Matters (*Ruiz*). Information about this level of detail about an inmate's experience is the kind of information which would be found in the kinds of files made sensitive under *Ruiz* and therefore excepted under Section 552.107. See, ORD 560, OR94-122 (Request of Riggs re: Michael Blair, TDCJ OR94-0126-0060).

**Other material**

At various places in these reports, the social security numbers and home addresses of employees appear. These are excepted from release consistent with the provisions of Section 552.117, insofar as it excepts the home addresses, family information and telephone numbers of TDCJ employees and their family members from release to the public.

Polygraph examination reports are excepted from release, consistent with the provisions of Section 552.101, Confidential Information. This exception arises from the polygraph examination statute, V.T.C.S., Article 4413(29cc), Section 19a, ORD-316 (1982), ORD-430 (1985).

At least one of these investigations was probably triggered by the filing of a formal grievance by an inmate. Copies of at least the initial inmate grievance would be included as part of that report. We believe inmate grievances are excepted from release consistent with the provisions of Section 552.107, Certain legal Matters (*Ruiz*) because inmate grievances are defined as sensitive materials and thereby excepted from release to members of the general public under the *Ruiz Stipulated Modification* and the *Ruiz Final Judgement*. See ORD-560, OR94-122 (Request of Riggs re: Michael Blair, TDCJ OR94-0126-0060). Moreover, inmate grievances are also excepted consistent with the provisions of Section 552.101, Confidential Information, because of state and related statutes relating to inmates grievances. See also RQ 717, now under consideration by the Opinion Committee.

Finally, at least some of the investigations are use of force investigations, which are also excepted from release by *Ruiz* as sensitive documents. See, ORD 560 and preceding paragraph.

V.

For the reasons above stated, we believe that the materials identified as such are excepted from release to this requestor and to members of the general public.

Sincerely,



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