



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 14, 2012

Ms. Patricia Fleming
Assistant General Counsel
Office of the General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, TX 77342-4004

OR2012-07088

Dear Ms. Fleming:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 452172.

The Texas Department of Criminal Justice (the "department") received two requests from different requestors.¹ The first requestor requested (1) the amount of pentobarbital, in grams, the department has for use in future executions and (2) "whether the back-up set [of lethal injection drugs] is actually taken up into a syringe ready to use, or whether it is left in the closed bottle and returned to the stock room when the execution is finished." The second requestor requested "the amount of lethal injection drugs [the department] currently has on its possession." You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note part two of the first requestor's request is phrased in the form of a question. The Act does not require a governmental body to answer general questions, perform legal

¹The first request was received by the department on February 13, 2012, while the second request was received on February 16, 2012. For purposes of this ruling, the requestor whose request was received on February 13 will be referred to as the "first requestor," while the requestor whose request was received on February 16 will be referred to as the "second requestor."

research, or create new information in response to a request for information. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). The Act does require the governmental body to make a good faith effort to relate a request to information that the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8, 561 at 8-9 (1990), 555 at 1-2, 534 at 2-3 (1989). In this instance, we assume the department has made a good faith effort to relate this portion of the first requestor's request to information in the department's possession, and to the extent any such information exists, we assume it has been released to the first requestor.

Next, we note some of the submitted information, which we have marked, is not responsive because it was created after the date the department received the instant requests. The department need not release non-responsive information in response to these requests, and this ruling will not address that information.²

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You assert the responsive information is confidential pursuant to the common-law physical safety exception that the Texas Supreme Court recognized in *Texas Department of Public Safety v. Cox Texas Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 117 (Tex. 2011) ("freedom from physical harm is an independent interest protected under law, untethered to the right of privacy"). In the *Cox* decision, the Supreme Court recognized, for the first time, a common-law physical safety exception to required disclosure. *Cox*, 343 S.W.3d at 118. Pursuant to this common-law physical safety exception, the court determined "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm." *Id.* In applying this new standard, the court noted "deference must be afforded" law enforcement experts regarding the probability of harm, but further cautioned "vague assertions of risk will not carry the day." *Id.* at 119.

You indicate the responsive information contains information about the amount of lethal injection drugs the department has in its possession. You assert this information is confidential under the common-law physical safety exception because disclosure of this information will lead to the detection of the identity of the department's suppliers of lethal injection drugs, and as a result, the suppliers will be subject to potential harassment. You also allege that there would be a substantial threat of physical harm to the suppliers because previously known suppliers have been subject to harassment by certain interest groups in the past, and you believe such harassment can escalate into violence. Upon review, while we acknowledge the department's concerns, we find you have not established disclosure of the responsive information would create a substantial threat of physical harm to any individual,

²As our ruling is dispositive for this information, we need not address your section 552.107 argument against disclosure.

and thus, the department may not withhold the responsive information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

You assert the responsive information is excepted under section 552.108(b)(1). You contend disclosure of this information, when coupled with other publicly known information, would allow certain parties to determine which companies supply the department with lethal injection drugs. You argue this knowledge will result in attempts by these parties to disrupt the department’s supplier’s operations, thus inhibiting the department’s ability to obtain such drugs, and thus “thwart[ing] [the department’s] ability to effectuate state law by interfering with the discharge of [the department’s] statutory duty to carry out the execution process.” Upon review, we find your arguments as to how disclosure of the requested drug quantities would result in the disruption of the execution process or otherwise interfere with law enforcement to be too speculative. *See* Open Records Decision No. 582 (1990) (finding prospects for criminal prosecution too speculative to withhold information under predecessor to section 552.108). Thus, we find you have failed to establish how public access to the information at issue would interfere with law enforcement. Consequently, the department may not withhold the responsive information under section 552.108(b)(1) of the Government

Code. As you raise no further exceptions to disclosure, the department must release the responsive information to the respective requestors.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Sean Opperman
Assistant Attorney General
Open Records Division

SO/som

Ref: ID# 452172

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)