



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 29, 2014

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

OR2014-09184

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# 524234.

The Texas Department of Criminal Justice (the "department") received requests for 1) the execution protocol; 2) the drugs to be used; 3) the drugs' source; 4) the dates the drugs were ordered and received; and 5) testing of the drugs. The department released some of the information and claims some of the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.118, and 552.136 of the Government Code. We have considered the exceptions the department claims and reviewed the submitted information. We have also received and considered the requestor's comments. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we must address the department's obligations under the Act. Section 552.301(e) of the Government Code requires a governmental body to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(D). The department received the requests for information on March 11 and 18, 2014. The two requests ask for the exact same information. Thus, the department's deadline for submitting the information it seeks to

withhold is within fifteen business days of its receipt of the request on March 11, which is April 1, 2014. However, the department submitted some of the requested information on April 8, 2014. *See id.* § 552.308(a) (deadline under the Act is met if document bears receipt mark of common or contract carrier indicating time within deadline period). Consequently, the department failed to comply with section 552.301(e) of the Government Code for a portion of the information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing the information is made confidential by another source of law. *See* ORD 630. The department claims section 552.108 of the Government Code for portions of the untimely submitted information. However, this exception is discretionary in nature. It serves to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, the department may not withhold the untimely submitted information pursuant to section 552.108 of the Government Code. However, because sections 552.101, 552.118, and 552.136 of the Government Code make information confidential, they provide compelling reasons to overcome the presumption of openness. Thus, we will consider the applicability of these exceptions to the untimely submitted information. In addition, we will consider all of the department's claimed exceptions for the timely submitted information.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by judicial decision and the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a common-law physical safety exception to required disclosure. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). Pursuant to this common-law physical safety exception, "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm." *Id.* In applying this 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.

The department seeks to withhold the identifying information of the pharmacy and pharmacist who provide the drugs used in executions and other information relating to the provision of said drugs because release of the information would jeopardize the safety of the persons associated with the pharmacy. The department notes "a very real threat of physical violence made to another pharmacy vendor" that supplied lethal injection drugs and threats received by the previous provider of the drugs. Furthermore, the department submits a threat assessment from the Director of the Texas Department of Public Safety ("DPS") stating drug suppliers such as the pharmacy at issue face "a substantial threat of physical harm." As noted above, the supreme court stated, "deference must be afforded DPS officers and other law enforcement experts about the probability of harm." *Cox*, 343 S.W.3d at 119. Thus, in this instance and when analyzing the probability of harm, this office must defer to the representations of DPS, the law enforcement experts charged with assessing threats to public safety. Based on these representations and our review, we find the department must withhold the identifying information of the pharmacy and pharmacist we have marked under section 552.101 of the Government Code in conjunction with the common-law physical safety exception. However, the department has not demonstrated how disclosure of the remaining information would subject the pharmacy and pharmacist to a substantial risk of physical harm. Thus, the department may not withhold the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Next, we consider the department's section 552.108(b)(1) assertion for the remaining information. 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)(1) 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).

The department contends disclosure of the remaining information will result in attempts to threaten, harass, and intimidate the drug supplier into terminating business with the department, and thus, interfering with the discharge of the department's statutory duty to carry out the execution process. Upon review, we find the department failed to show release of the remaining information would result in the disruption of the execution process or otherwise interfere with law enforcement. Consequently, the department may not withhold the remaining information under section 552.108(b)(1) of the Government Code.

The department also asserts the remaining information is excepted from disclosure pursuant to section 552.118 of the Government Code. Section 552.118 provides:

Information is excepted from [required public disclosure] if it is:

(1) information on or derived from an official prescription form or electronic prescription record filed with the director of the [DPS] under Section 481.075, Health and Safety Code; or

(2) other information collected under Section 481.075 of that code.

Gov't Code § 552.118. Section 481.075 of the Health and Safety Code enumerates the information a practitioner, who prescribes a controlled substance listed in Schedule II, is required to include in a prescription form. Health & Safety Code § 481.075. "Prescription" is defined as an order by a practitioner to a pharmacist for a controlled substance for a particular patient that specifies among other things, the name and address of the patient and the name and quantity of the controlled substance prescribed. *Id.* § 481.002(41). The department makes a conclusory statement the remaining information consists of information on or derived from official prescription forms filed with DPS under section 481.075 of the Health and Safety Code. However, the department failed to explain how the remaining information is derived from a prescription for a particular patient or meets the requirements of the Health and Safety Code regarding official prescription forms for Schedule II substances. *Id.* § 481.075(e). Because the department has failed to show the applicability of section 552.118, the department may not withhold the remaining information on this basis.

The remaining information contains credit card numbers and a federal Drug Enforcement Agency registration number subject to section 552.136 of the Government Code. Section 552.136 provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Upon review, the department must withhold the credit card

numbers and federal Drug Enforcement Agency registration number we marked under section 552.136 of the Government Code.

In summary, the department must withhold the identifying information of the pharmacy and pharmacist we marked pursuant to section 552.101 of the Government Code in conjunction with the common-law physical safety exception and the credit card numbers and federal Drug Enforcement Agency registration number we marked under section 552.136 of the Government Code. The department must release the remaining information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 524234

Enc. Marked documents

c: Requestor
(w/o enclosures)