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ATTORNEY GENERAL OF TEXAS

March 24, 2015

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

OR2015-05591

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# 557943.

The Texas Department of Criminal Justice (the "department") received a request for the execution protocol and information relating to the drugs to be used in a specified execution. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the information you have submitted.

We note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted information contains a contract relating to the expenditure of public funds that is subject to section 552.022(a)(3). The department must release this information pursuant to section 552.022(a)(3), unless it is made confidential under the Act or other law. *See id.* Although the department raises section 552.108 of the Government Code for this information, this exception is discretionary in nature and does not make information confidential under the Act. *See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver).* Therefore, the department may not withhold the information subject to section 552.022(a)(3) under section 552.108. You also claim section 552.101 of the Government Code, which makes information confidential for purposes of section 552.022(a)(3). Therefore, we will determine whether the information subject to section 552.022(a)(3) must be withheld under section 552.101 of the Government Code. We will also consider your arguments for the information that is not subject to section 552.022.

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 submitted information, including certain identifying information, because release of the information would jeopardize the safety of the persons associated with the appropriation of the execution drugs. The department notes "a very real threat of physical violence made to" previous compounding pharmacies that supplied lethal injection drugs and threats received by the previous drug provider. Furthermore, the department submits a threat assessment from the Director of the Texas Department of Public Safety ("DPS") stating drug suppliers 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 information we 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 an individual 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 not subject to section 552.022. Section 552.108(b)(1) of the Government Code exempts 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) exempts 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 at issue will result in attempts to threaten, harass, and intimidate the pharmacy vendor 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 at issue would result in the disruption of the execution process or otherwise interfere with law enforcement. Consequently, the department may not withhold the remaining information at issue under section 552.108(b)(1) of the Government Code.

The remaining information contains access device numbers 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 access device number we marked under section 552.136 of the Government Code.

In summary, the department must withhold the information we have marked under section 552.101 in conjunction with the common-law physical safety exception. The department must withhold the access device number we marked under section 552.136 of the Government Code. The remaining information must be released.

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](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,



Melanie J. Villars  
Assistant Attorney General  
Open Records Division

MJV/dls

Ref: ID# 557943

Enc. Submitted documents

c: Requestor  
(w/o enclosures)