



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 18, 2010

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

OR2010-17507

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# 400366.

The Texas Department of Criminal Justice (the "department") received requests from four requestors for information and correspondence regarding the department's suppliers and current stock of lethal injection drugs, including efforts to acquire more or alternative drugs, correspondence with other states or entities regarding those drugs, and correspondence with a named company. You claim the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.151 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by three of the requestors and an interested third party. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we note you have not submitted information responsive to the requests for records or correspondence regarding efforts to acquire more of the currently used drugs, records or correspondence regarding efforts to find alternative drugs, correspondence with other states or entities regarding the drugs, or correspondence with the named company. To the extent information responsive to these aspects of the requests existed on the dates the department received the requests, we assume you have released it. If you have not released any such information, you must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records

Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, you state the only form of media maintained by the department that contains information regarding the requested lethal injection drug stock quantities and expiration dates are the labels affixed to each vial of drug. You have inquired whether the submitted photographs of drug vial labels are sufficient to be considered responsive to these parts of the requests, or whether the department is required to count, inventory, and reduce to writing the requested information regarding quantities and expiration dates. The Act does not require a governmental body to make available information that did not exist when the request was received, nor does it require a governmental body to compile information or prepare new information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). However, a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See Open Records Decision No. 561 at 8-9 (1990)*. As you have submitted information you deem to be responsive to the requests for quantities and expiration dates, we will address your claimed exceptions for this information, as well as the remaining submitted information.

We note the submitted information contains purchase orders. Section 552.022 of the Government Code provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under 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 purchase orders are vouchers related to the expenditure of public funds by the department and are, thus, made public under section 552.022(a)(3). Information subject to section 552.022(a)(3) must be released unless it is expressly confidential under other law. You claim the last dates of purchase listed on some of the purchase orders are excepted from disclosure under section 552.108 of the Government Code. This section, however, is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108)*. As such, section 552.108 is not other law that makes information confidential for the purposes of section 552.022(a)(3). Therefore, the department may not withhold the last dates of purchase under section 552.108 of the Government Code. You also claim the last dates of purchase are excepted under

sections 552.101 and 552.151 of the Government Code. As these sections are considered other law for purposes of section 552.022(a)(3), we will consider the applicability of sections 552.101 and 552.151 to the submitted last dates of purchase, as well as your arguments against disclosure for the remaining information.

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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. You seek to withhold under common-law privacy and “special circumstances” the quantities and expiration dates of the department’s lethal injection drug stock, the last dates of purchase of those drugs, and the names of the suppliers from which the department acquires those drugs. However, the Third Court of Appeals ruled the “special circumstances” exception found in past Attorney General Open Records Decisions directly conflicts with Texas Supreme Court precedent regarding common-law privacy. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 287 S.W. 3d 390 (Tex. App.—Austin 2009, pet. filed). The court of appeals ruled the two-part test set out in *Industrial Foundation* is the “sole criteria” for determining whether information can be withheld under common-law privacy. *Id.*; see also *Indus. Found.*, 540 S.W.2d at 686. In this instance, the information at issue consists of drug quantities, expiration dates, last dates of purchase, and supplier names. You have not explained how this information is highly intimate or embarrassing. As you have failed to demonstrate the information meets the first prong of the *Industrial Foundation* test for privacy, we find the drug quantities, expiration dates, last dates of purchase, and supplier names at issue are not confidential under common-law privacy and the department may not withhold this information under section 552.101 of the Government Code.

Section 552.151 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov’t Code § 552.151. You seek to withhold the requested drug quantities, expiration dates, last dates of purchase, and supplier names under section 552.151. This section, however, applies only to information that relates to an employee or officer of the department. As none of the information you seek to withhold pertains to a department employee or officer, we find you have failed to demonstrate the applicability of section 552.151 to the information at

issue. Consequently, none of the information you seek to withhold may be withheld under section 552.151 of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. *Id.* § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). 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.” *See City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). 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). 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 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is 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).

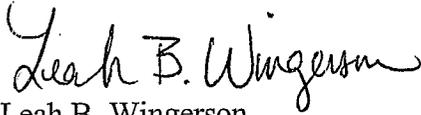
You assert the requested drug quantities and expiration dates are excepted under section 552.108(b)(1). You contend disclosure of this information, when coupled with other publicly known information, would allow death row offenders and the public to determine how much of the lethal injection drugs the department has available for future executions. You argue this knowledge will motivate those offenders and the public to disrupt the offenders’ scheduled executions. Although gaining this knowledge may motivate the offenders and/or public to disrupt the executions, you have not explained how disclosure of the requested drug quantities and expiration dates would actually allow or aid the offenders or public to disrupt the execution process or otherwise interfere with law enforcement. 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 requested drug quantities and expiration dates under section 552.108(b)(1) of the Government Code. As you have not claimed any other exceptions to disclosure, the requested 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.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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 400366

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Brian W. Stull
Senior Staff Attorney
ACLU Foundation
201 West Main Street, Suite 402
Durham, North Carolina 27701
(w/o enclosures)

Ms. Lisa Graybill
Legal Director
ACLU of Texas
P.O. Box 12905
Austin, Texas 78711-2905
(w/o enclosures)

Mr. Joshua Houston
Ms. Bee Moorhead
Texas Impact
221 East 9th Street, Suite 403
Austin, Texas 78701
(w/o enclosures)