



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 6, 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

OR2012-08649

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# 454335.

The Texas Department of Criminal Justice (the "department") received a request for "copies of purchase orders, invoices[,] and other purchasing documents" pertaining to specified invoices. You claim some of requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from an interested third party. *See* Gov't Code § 552.304 (interested party may submit written comments stating why information should or should not be released).

Initially, we note some of the submitted information consists of information subject to section 552.022(a)(3) of the Government Code. Section 552.022(a)(3) provides "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body" is subject to required public disclosure unless it is made confidential under this chapter or "other law." *Id.* § 552.022(a)(3). Although you raise section 552.108 of the Government Code for portions of the information at issue, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver).

Therefore, the department may not withhold the submitted information subject to section 552.022(a)(3), which we have marked, under section 552.108. However, because section 552.101 of the Government Code is “other law” for purposes of section 552.022, we will consider your argument under this section for all of the submitted information. In addition, we note some of the information subject to section 552.022(a)(3) contains an account number subject to section 552.136 of the Government Code.¹ Accordingly, because section 552.136 makes information confidential under the Act, we will consider its applicability to this information. *See* Gov’t Code § 552.136 (providing for “confidentiality” of information). We will also consider your arguments under section 552.108 for the submitted information not subject to section 552.022(a)(3).

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 portions of the submitted information are 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 seek to withhold addresses, phone numbers, distributor information, various numeric identifiers, certain descriptions contained in the invoices and purchasing documents, notations, and portions of e-mail correspondence because you state this information pertains to the 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 identities of the department’s suppliers and distributors of lethal injection drugs, and as a result, the suppliers and distributors will be subject to potential harassment. You also allege there would be a substantial threat of physical harm to the companies at issue 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 information at issue would create a substantial threat of physical harm to any individual. Thus, the department may not withhold

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

any of the submitted 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)(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).

You also assert the information at issue 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 suppliers’ operations, thus inhibiting the department’s ability to obtain such drugs and “disrupt[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 information at issue 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 remaining information not subject to section 552.022 under section 552.108(b)(1) of the Government Code.

Section 552.136 of the Government Code 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.” *See* Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Therefore, the department must withhold the submitted billing account number we have marked under section 552.136 of the Government Code. As no other exceptions to disclosure have been raised, 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.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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/som

Ref: ID# 454335

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Mr. Clive A. Stafford Smith
Reprieve
P.O. Box 52742
London, UK, EP4P 4WS