



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 3, 2012

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

OR2012-10208

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# 457886.

The Texas Department of Criminal Justice (the "department") received a request for twelve categories of information pertaining to the department's execution protocol and the procurement and use of lethal injection drugs. You state some information has been or will be released. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note some of the submitted information was the subject of a previous request for a ruling, in response to which this office issued Open Records Letter No. 2012-08649 (2012). In this prior ruling, we ruled the department must withhold the marked billing account numbers under section 552.136 of the Government Code and must release the remaining information. We have marked the information subject to this prior ruling. As we have no indication there has been any change in the law, facts, or circumstances on which this ruling was based, we conclude the department must rely on Open Records Letter No. 2012-08649 as a previous determination and withhold or release the marked information

in accordance with it.<sup>1</sup> See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will address your arguments against disclosure of the remaining submitted information.

We note some of the remaining information consists of purchase orders, invoices, and vouchers that are 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.” Gov’t Code § 552.022(a)(3). Although you raise section 552.108 of the Government Code for portions of the information subject to section 552.022(a)(3), section 552.108 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 information subject to section 552.022(a)(3) under section 552.108. However, you also raise section 552.101 of the Government Code for portions of this information, and we note some of the information contains account numbers subject to section 552.136 of the Government Code.<sup>2</sup> Accordingly, because sections 552.101 and 552.136 make information confidential under the Act, we will consider their applicability to the information at issue. We will also consider your arguments under sections 552.101 and 552.108 for the remaining 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 Texas 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]

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<sup>1</sup>Because our ruling as to this information is dispositive, we do not address your arguments against its disclosure.

<sup>2</sup>The 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).

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, and certain notations and descriptions contained in the information at issue. You assert this information is confidential under the common-law physical safety exception because disclosure of this information will reveal 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 could 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 any of the submitted information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

You assert the remaining information not subject to section 552.022(a)(3) is excepted under section 552.108 of the Government Code. Section 552.108(b)(1) 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 contend disclosure of some of the remaining 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 these parties will attempt to disrupt the operations of the department's suppliers, thus inhibiting the department's ability to obtain such drugs and interfering with the department's statutory duty to carry out the execution process. You argue release of the inventory information would permit certain parties to estimate when the department's stock will be facing depletion or expiration and then harass potential suppliers. Upon review, we find your arguments as to how disclosure of the remaining information 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 this information would interfere with law enforcement. Consequently, the department may not withhold any of the remaining information under section 552.108(b)(1) of the Government Code.

Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of this chapter, 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). An access device number is one that may be used to "(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument," and includes an account number. *Id.* § 552.136(a). The department must withhold the billing account numbers we have marked under section 552.136.

In summary, the department must withhold or release the information we have marked subject to Open Records Letter No. 2012-08649 in accordance with that ruling. The department must withhold the billing account numbers we have marked under section 552.136 of the Government Code. The remaining information must be released to the requestor.

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](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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

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MHB/som

Ref: ID# 457886

Enc. Submitted documents

c: Requestor  
(w/o enclosures)