



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 26, 2014

Ms. Molly Cost  
Assistant General Counsel  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2014-17193

Dear Ms. Cost:

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# 536045 (PIR# 14-2561).

The Texas Department of Public Safety (the "department") received a request for information regarding "the authority of [the Texas Department of Criminal Justice ("TDCJ")] to possess and dispense control [sic] substances at the Huntsville Unit and to seize any improperly held controlled substances." You claim the submitted information may be excepted from disclosure under section 552.108 of the Government Code. Additionally, you state the department has notified TDCJ of the request. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from TDCJ. We have considered the submitted arguments and reviewed the submitted information.

The department and TDCJ assert the submitted information is excepted from disclosure under section 552.108(b)(1) of the Government Code. 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[.]" *Id.* § 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 states release of the submitted information could jeopardize TDCJ operations. In addition, TDCJ states the submitted information pertains to TDCJ's storage of drugs used in executions and details TDCJ's emergency plan during an execution. TDCJ explains this emergency plan "details personnel responsibilities and prioritized actions in the event of riots, by prison inmates or anti-death penalty protestors, hostage-taking, violent raids on the execution chamber, the storming of the Warden's office, bomb threats or other major incidents." TDCJ contends release of such information "would permit the detection of any weaknesses in the emergency plan to prevent drug diversion during a scheduled execution and would provide a road map to avoid or otherwise thwart responses to terroristic threats emanating from militant activists or inmates." Thus, TDCJ contends release of the submitted information would interfere with law enforcement and the prevention of crime. Upon review, we find the department may withhold the information we have marked under section 552.108(b)(1) of the Government Code.<sup>1</sup> However, the department and TDCJ have failed to demonstrate how release of the remaining information would interfere with law enforcement. Consequently, the department may not withhold the remaining information under section 552.108(b)(1) of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is made confidential by other statutes. TDCJ raises section 552.101 in conjunction with sections 418.176 and 418.181 of the Texas Homeland Security Act (the "HSA"), chapter 418 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 as part of

---

<sup>1</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

the HSA. These provisions make certain information related to terrorism confidential. Section 418.176(a) provides:

Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

- (1) relates to the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;
- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

*Id.* § 418.176(a). Section 418.181 provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

*Id.* § 418.181. The fact that information may be related to a governmental body's security concerns or emergency preparedness does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

TDCJ argues portions of the remaining information reveal certain security measures designed to restrict access to the execution drugs, which, if released, would "divulge the TDCJ's internal security tactics for preventing a terroristic or criminal raid upon [TDCJ's] execution drugs before, during and after the execution process." Upon review, we find TDCJ has failed to establish any of the remaining information relates to the staffing requirements or tactical plan of an emergency response provider, or consists of a list or compilation of pager or telephone numbers of an emergency response provider. Thus, TDCJ has not established the applicability of section 418.176 of the Government Code to the remaining information. Further, TDCJ has not provided any arguments explaining how section 418.181 encompasses any of the remaining information. Accordingly, the department may not withhold any of the

remaining information under section 552.101 of the Government Code in conjunction with section 418.176 or section 418.181 of the Government Code.

Next, TDCJ claims portions of the remaining information are protected under the common-law physical safety exception. Section 552.101 of the Government Code also 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.

TDCJ seeks to withhold the identifying information of the provider of drugs used in executions because release of such information would jeopardize the physical safety of the individuals associated with the drug provider. In support of its assertion, TDCJ provides accounts of threatened and actual violence towards other providers of execution drugs. Furthermore, TDCJ submits a portion of a threat assessment from the Director of the department stating drug suppliers such as the drug provider at issue face "a substantial threat of physical harm." As noted above, the supreme court stated, "deference must be afforded [department] 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 the department, 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 drug provider, which 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 individuals at issue 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.

TDCJ contends portions of the remaining information are 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. However, none of the remaining information consists of a credit card, debit card, charge card, or access device number; thus, the department may not withhold any of the remaining information under section 552.136 of the Government Code.

In summary, the department may withhold the information we marked under section 552.108(b)(1) of the Government Code. Additionally, the department must withhold the identifying information we marked pursuant to section 552.101 of the Government Code in conjunction with the common-law physical safety exception and the access device 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](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,



Lee Seidlits  
Assistant Attorney General  
Open Records Division

CLS/ds

Ref: ID# 536045

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Ms. Patricia Fleming  
Assistant General Counsel  
Texas Department of Criminal Justice  
P.O. Box 4004  
Huntsville, Texas 77342-4004  
(w/o enclosures)