

November 5, 2010

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, TX 78711

Dear Open Records Division,

Re: Tex. Gov't Code §552.304 - Submission of Public Comments - Concerning Open Records Request File #400366 – Information on Lethal Injection Drugs.

Texas Impact is a nonprofit organization that represents mainstream religious traditions on a variety of public policy issues. Texas Impact has grave concerns over the Texas Department of Criminal Justice's refusal to release information regarding the cost, supply on hand, sources, and expiration dates of the three drugs used in the lethal injection process. Without public access to this information, there exists a meaningful lack of transparency regarding the Department's stewardship of taxpayer dollars, and there is no way to hold the Department accountable for complying with key provisions of Texas' capital punishment laws or with the United States Constitution.

The people of Texas have a right to know how their tax dollars are spent, including the cost of the chemicals used to kill individuals in the name of the people of Texas. Section 522.002(a)(3) of the Public Information Act requires disclosure of contracts relating to the expenditure of public funds unless an express exemption exists. The Department has not identified an express exemption sufficient to override the rule in favor of required release. The Department argues that the death penalty is a controversial political issue and that the release of information would so inflame death penalty opponents that it would be the equivalent of shouting fire in a crowded theatre—but the public policy debate includes many highly charged, emotional issues such as immigration, desegregation, the Trans-Texas Corridor, coal-fired power plants, nuclear power, textbooks, euthanasia, insurance rates, abortion, etc. Just because an issue arouses strong emotions does not mean a state agency is permitted to keep secrets.

Furthermore, if the expiration dates, sources, and amounts of the drugs on hand are not public information, there is no way to ensure that lethal injection procedures are being lawfully implemented. Like most states that impose the death penalty, Texas uses a three-drug combination in lethal injections. Sodium thiopental, an anesthetic, is the first drug administered. The sodium thiopental is intended to put the condemned person in a coma-like condition that renders the second two drugs (pancuronium bromide and potassium chloride, which stop breathing and the heart) painless and thus the punishment is not cruel and unusual. *Baze v. Rees*, 553 U.S. 35 (2008). However, if sodium thiopental is not administered in high enough doses, or if its potency

has been compromised, then a condemned inmate could be left conscious to feel what would be the equivalent of experiencing a heart attack while drowning completely paralyzed throughout the process. This would be unconstitutional under *Baze*.

If the Department is allowed to keep confidential the expiration dates, sources, and amounts on hands of sodium thiopental, there is no way to know if the Department is complying with *Baze*. If a drug passes its expiration date, it loses potency over time. The source of the drug is important because factors such as storage temperature or the manufacturing process can reduce a drug's effectiveness. If the Department does not have an adequate supply of the drug on hand, then it would be likely that condemned individuals would be insufficiently medicated.

Texas Impact hopes that the Department's unwillingness to release this information to the public is not an attempt to stifle potential litigation or legal challenges to its lethal injection procedures under the 8th Amendment. This would not be in keeping with the spirit of the Texas Public Information Act. Secrecy only increases the public's distrust of government, and arouses the imagination to speculate that the Department might be using ineffective drugs on inmates. The Texas Public Information Act was designed to prevent such corrosive speculation. "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." *Tex. Gov't Code 552.001*.

Sincerely,

Bee Moorhead
Executive Director

Joshua Houston
Legislative Counsel