

Texas Department of Criminal Justice

Brad Livingston
Executive Director

October 15, 2010

Honorable Greg Abbott
Attorney General of Texas
Open Records
P.O. Box 12548
Austin, Texas 78711-2548

RE: Public Information Request of Mike Ward

Dear General Abbott:

This is our brief about why we believe that the request made by the above referenced person covers information that is excepted from release. TDCJ requests that you send your ruling to:

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

Attachment A contains our earlier correspondence about this request and contains a copy of the request.

The items to which we believe the exceptions to release applies are enclosed for you under separate cover.

I.

Our mission is to provide public safety, promote positive change in offender behavior, reintegrate offenders into society, and assist victims of crime.

Office of the General Counsel

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We believe that the submitted material is excepted from release pursuant to Texas Government Code,

Section 552.101, Information Confidential by Law;
Section 552.108, Certain Law Enforcement Records; and
Section 552.151, Public Employee or Officer Personal Safety.

Having identified and/or processed the responsive material, we withdraw our assertion that the following statutes are applicable:

Section 552.102, Certain Personnel Information;
Section 552.103, Information Relating to Litigation;
Section 552.104, Information Relating to Competition or Bidding;
Section 552.107, Certain Legal Matters;
Section 552.110, Certain Commercial Information;
Section 552.111, Agency Memoranda;
Section 552.116, Audit Working Papers;
Section 552.122, Test Items
Section 552.130, Motor Vehicle Records;
Section 552.134, Certain Information Relating to Inmate of the TDCJ;
Section 552.137, Confidentiality of Certain E-Mail Addresses;

II.

Background: Requestor has requested the following information from the TDCJ:

1. Documents showing the names of any suppliers to the State of Texas during the past year of the three drugs used for lethal injections, the amounts of state money paid to each supplier and the products that were purchased from each. I would ask for any supporting attachments, documents or materials concerning those payments.
2. The amounts of each of the three drugs used in lethal injections that are on hand at TDCJ as of this date, and the expiration dates of each of those drugs that are on hand.
3. Any correspondence, emails or other communication with Hospira Inc. and the Texas Department of Criminal Justice during the past year.
4. Any correspondence, emails or other communication from officials in other states and the Texas Department of Criminal Justice concerning any of those drugs, including but not limited to sodium thiopental.
5. A copy of any Texas Public Information request or requests pertaining to lethal injection drugs that have been filed with your agency during the past year.

Our non-confidential responsive information has been or will have been made available to the requestor. Our confidential responsive material is enclosed under separate cover, and we ask you

to withhold it from the requestor. We have set out herein our written comments stating the reasons why our stated exceptions apply that would require or allow, as the case may be, the information to be withheld.

III.

Preliminary Matter:

Amounts of sodium thiopental, pancuronium bromide and potassium chloride in possession of the TDCJ as of September 27, 2010, the date of this request:

According to Texas Government Code section 552.002 (c), the general forms in which the media containing public information exist include a book, paper, letter, document, print out, photograph, film, tape, microfiche, microfilm, photostat, sound recording, map and drawing and a voice date or video representation held in computer memory. As to the amounts of sodium thiopental, pancuronium bromide and potassium chloride in possession of the TDCJ as of September 27, 2010 and their expiration dates, the only form of media collected, assembled, or maintained by the TDCJ that contains this information is the label affixed to each vial of the respective drugs.

If this information is subject to release, the agency requests your guidance as to whether photocopies of the labels must be taken of each vial and released, or whether the amounts of the drugs on hand must be counted, inventoried, reduced to writing, and divulged to the requestor?

Section 552.101 Exception: Information Confidential by Law

Special Circumstances

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Tex. Gov't Code § 552.101. This section also encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under section 552.101 in conjunction with common law privacy, information may be withheld from public disclosure in "special circumstances." *See* Open Records Decision No. 169 (1977). Your office considers such "special circumstances" to refer to a very narrow set of situations in which release of the information at issue would likely cause someone to face "an imminent threat of physical danger." *Id.* at 6. "Special circumstances" do not include "a generalized and speculative fear of harassment or retribution." *Id.*

The ideological rift between proponents and opponents of the death penalty is deep and entrenched. It is an intense cultural war similar to that between the pro-life and pro-choice camps in which the debate has escalated from letters-to-the-editor to the picketing of abortion clinics to the bombing of those clinics and the stalking and murder of abortionists. The most recent development in the competing agendas of anti-death penalty advocates and law

enforcement is the nationwide shortage of sodium thiopental, the anesthetic agent used by the TDCJ in the lethal injections administered to inmates condemned to execution.

The judge presiding over a capital punishment case sets the date of execution for a death row offender when it appears that appeals in the case have been exhausted. In accordance with the TDCJ's *Execution Procedure, May 2008*, which is public information, when the TDCJ receives a warrant of execution from the court, we add the offender's name to the list of scheduled executions, scheduling the execution on the date ordered by the court. The execution must be completed by midnight on that date.

Between 5 p.m. and 6 p.m. on the date of execution, the lethal injection drugs are mixed and syringes for each are prepared. A back-up set of each of the three drugs is mixed and placed in syringes in case unforeseen events make their use necessary. The mixture in both the initial syringe and in the back-up syringe of the sodium thiopental will consist of 120 milliliters of solution containing 3 grams of sodium thiopental. In other words, the initial syringe of sodium thiopental contains 3 grams of sodium thiopental and the back-up syringe contains 3 grams of sodium thiopental. If official notice of a stay is received after the syringes have been prepared, then the 6 grams of sodium thiopental are discarded. If the initial syringe of the sodium pentothal mixture is effective, producing death, the back-up syringe consisting of 3 grams of sodium thiopental is discarded. (*See Execution Procedure, pages 8 and 9*).

Similarly, the initial pancuronium bromide mixture syringe will contain 100 milligrams of pancuronium bromide and the back-up syringe will contain 100 milligrams of pancuronium bromide; the initial potassium chloride mixture syringe will contain 140 milli-equivalents of potassium chloride and the back-up syringe will contain 140 equivalents of potassium chloride. If official notice of a stay is received after the syringes have been prepared, then 200 milligrams of pancuronium bromide and 280 milli-equivalents of potassium chloride will be discarded. If the sodium pentothal is effective, meaning the condemned offender exhibits no visible sign of consciousness pursuant to injection, then the a syringe containing 100 milligrams of pancuronium bromide is administered, followed by a syringe containing 140 milli-equivalents of potassium chloride. The back-ups syringes of sodium pentothal (3 grams), pancuronium bromide (100 milligrams) and potassium chloride (140 milli-equivalents) are discarded. (*See Execution Procedure, pages 8 and 9*).

A subsequent execution date may not be earlier than the 31st day after the date the convicting court enters the order setting the execution date. The warrant of execution for the stayed execution date will have been recalled and will have to be reissued by the clerk 10 days after the court enters its order setting the new date for the execution. Tex. Code Crim. Pro. art. 43.141 (c) (Vernon Supp. 2009).

If the amount of thiopental currently on hand as of September 27, 2010 and a copy of the expiration date of same were to be released, a death row offender's free world supporters, including anti-death penalty organizations, can estimate the expiration date of the amount we currently have on hand by making the assumption that the 6 grams used per execution since the last date of purchase was used from a prior shipment with an earlier expiration date. Although this estimate may be high, it gives them a starting point for subtracting 6 grams per execution, as well as how much may have expired or when the remaining quantity will expire by accessing information of the shelf-life of sodium thiopental.

Likewise, if the amounts of pancuronium bromide and potassium chloride on hand as of September 27th were to be released, a death row offender's free world supporters, particularly the more militantly inclined, could perform a fairly accurate estimate of their expiration dates based upon the amounts currently in possession and the amounts of the doses utilized per execution.

We submit that the release of any of the above requested information would be akin to a local DPS office providing a requestor (a potential terrorist) with how much ammunition was stored with the office. For example, if there were a request submitted to the satellite DPS station in Huntsville for the amount of guns, bullets, and tear gas on hand, DPS would not release this information because the requestor could use it to ambush the office thinking that, as long as he had or could accumulate more ammunition than was on hand in the satellite station, he could overcome DPS.

As to the amounts of state money paid to the individual suppliers, if this information were to be released, the requestor could determine the amounts of the products purchased simply by consulting his neighborhood pharmacist, or pharmaceutical wholesaler or retailer.

Whether the TDCJ's annual shipping contract is with FED EX, as it currently is, UPS or another shipper is public information. This knowledge and knowledge of the destination of the shipment could provide sufficient details for a sophisticated researcher to determine the identity of the supplier, which has been previously protected by your office. *See* OR2008-08447.

Indeed, in OR2008-08447, issued June 20, 2008, your office recognized the merit of our argument that "special circumstances" existed which necessitated the withholding of the names of the vendors who supplied the agency with the drugs used in the lethal injection. We explained that our concern for the security of participants in the execution process, such as, officers and medical providers, extended to the employees of the companies that supply us with the lethal injection drugs. You acknowledged the validity of our concern for the welfare of the companies' employees, finding that "releasing the names of the companies would place the employees of those companies in imminent threat of physical danger." *See* OR2008-08447. You ruled that the department "must withhold the names of the companies under section 552.101 of the Government Code in conjunction with the 'special circumstances' aspect of common-law privacy." *Id*

Executions are inherently volatile events. The rhetoric of opponents of the death penalty has become increasingly violent to the point where we not only had large crowds voicing their objections but even had a group of militants outside the Huntsville Unit armed with various weapons, including assault rifles.

The TDCJ has been lucky in that those gathered or picketing outside the Huntsville Unit on a scheduled execution date have never fired weapons or even used knives; but, both of these events are very real possibilities and amount to more than a generalized and speculative fear of harassment or retribution. If the requestor published how much sodium thiopental we currently have and when it expires, this would operate to inflame an already volatile situation as described above. At our next two scheduled executions on October 21 and December 1, 2010, people could

get seriously injured or killed. This includes TDCJ employees monitoring the front and entrances/exits of the Huntsville Unit on the scheduled date of execution, local police working traffic control and monitoring the protestors picketing the Huntsville Unit, supporters of the victim, the victim's family, the offender's family members, members of the media, and elected officials.

In view of the intensity of the current socio-political climate on the issue of the death penalty, as well as the inherent volatility of executions as described *supra*, we believe that how much sodium thiopental, pancuronium bromide and potassium chloride we have had on hand as of September 27th 2010, along with their respective expirations dates, as well the amount of state money paid to the suppliers, and the suppliers' identities should be withheld pursuant to the special circumstances aspect of common law privacy under section 552.101 of the Government Code.

IV.

Section 552.151 Exception: Public Employee or Officer Personal Safety

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.

We believe that under the specific circumstances pertaining to the TDCJ employees on duty at the Huntsville Unit on the date of a scheduled execution, the release of the requested information would only increase what is already a substantial threat of physical harm as described above in our special circumstances argument under section 552.101 in conjunction with common law privacy.

V.

Section 552.108 Exception: Certain Law Enforcement, Corrections and Prosecutorial Information

Section 552.108, Texas Government Code states, in relevant part,

(b) An 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 is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution.

TDCJ is a "law enforcement agency" within the meaning of this section. (ORD-413, 1984); (ORD-413, 1984).

Both the courts and the Attorney General's Office have provided the TDCJ a great deal of deference as to what constitutes a security threat to a prison facility. In ORD-413 (1984), the Attorney General determined that the law enforcement exception, now Texas Government Code section 552.108, applied to except the release of information about the deployment of law enforcement officers, TDCJ security personnel, and barricades for a scheduled execution.

In subsequent decisions, the Attorney General decided that particular classes of prison security operational material are excepted from release, e.g., post orders, (OR92-131), (OR92-0103-0004); the transportation manual, (OR90-576), (OR90-0706-0041); emergency procedures, (OR91-064), (OR90-0907-0158); and procedures for using restraints (e.g., handcuffs), (OR94-517), (OR94-0404-0197).

Additionally, for basically the reasons above, the Attorney General agreed that detailed unit shift rosters were excepted from release because the level of minute information they provided about unit operations could be used to compromise the physical security of the unit. (OR95-588); (OR95-0228-0123). Again, in ORD-531 (1989), the Attorney General determined that the detailed policy in a police manual on use of force was excepted from release.

As already stated above, knowing how much sodium thiopental we currently have, its expiration date and that 6 grams of sodium thiopental are used with each execution or discarded if prepared before a stay is received would reveal how much sodium thiopental we have for future executions. Knowing how much pancuronium bromide and potassium chloride we have on hand, their expiration dates and that 200 milligrams of pancuronium bromide and 280 milliequivalents of potassium chloride will be used with each execution or discarded if prepared before a stay is received would reveal how much of these drugs the TDCJ has for future executions.

An inmate who is not executed on the first execution date set for his execution knows that a subsequent execution date may not be earlier than the 31st day after the date the convicting court entered the order setting his first execution date.¹ This knowledge, coupled with the knowledge acquired from his free world supporters regarding how much sodium thiopental we have for future executions, will motivate an offender to disrupt his execution so that it cannot go forward.

If the amount of sodium thiopental, pancuronium bromide and potassium chloride on hand as of September 27th and their respective expiration dates are released, the public will know that we have the capability of executing a finite number of death row offenders. This knowledge will embolden a death-row offender and his confederates in the more militant anti-death penalty organizations to disrupt the execution process. For example, if an offender knew that the TDCJ's supply of sodium thiopental, pancuronium bromide and potassium chloride were either to expire or become exhausted in June of 2011 and if his scheduled date of execution were February of 2011, then he would disrupt his February 2011 execution so that it could not go forward. Knowing that the warrant of execution for the aborted execution would have been recalled and reissued by the clerk 10 days after the court enters its order setting the new date for

¹ Tex. Code Crim. Proc. art. 43.14 Execution of Convict (Vernon Supp. 2009).

the execution, the offender would also know there was a good chance of other offenders being executed before him. Offenders scheduled for execution could keep playing this game until our supplies of the three drugs had either expired or become exhausted.

Thus, we believe that releasing the amount of sodium thiopental that we currently have and its expiration date will undermine and interfere with the agency's discharge of its statutory duty to carry out the execution process.

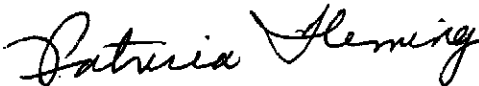
State law specifies lethal injection, so executions will once again be placed on hold until the legislature is able to amend the law to provide an alternative form of execution, i.e., hanging, electrocution, firing squad, or the gas chamber.²

It is our belief that release of the amount of sodium thiopental, pancuronium bromide and potassium chloride that we currently have on hand and their expiration dates would interfere with law enforcement.

VI.

For the reasons above stated, we believe that the requested information should not be available to this requestor or to any other member of the general public.

Sincerely,



Patricia Fleming
Assistant General Counsel
OFFICE OF THE GENERAL COUNSEL

cc: Mike Ward
Austin-American Statesman
305 S. Congress Avenue
Austin, Texas 78704

PF/dkp
Attach
1010016PF/PIR/Ward

(Note for administrative purposes only: This brief and subject material placed in FedEx pickup on 10/15/10).

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² *Id.*