



October 25, 2010

Honorable Greg Abbott  
Attorney General of Texas  
P.O. Box 12548  
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Via fax: 512-463-2092

Re: Public Information Requests Regarding: Disclosure of Amount of Sodium Thiopental in TDCJ possession

Dear General Abbott:

In a request dated September 28, 2010, as well as one previously assigned identification number 40036, the Texas Department of Criminal Justice (“TDCJ”) has requested a ruling from your office that the amount of sodium thiopental (and related information) the TDCJ possesses is exempt from disclosure under Texas’ Public Information Act. TDCJ cites a common-law right of privacy, an exemption for information concerning public employees or officers, and the law enforcement exemption. Because these exemptions do not apply and no other reason supports TDCJ’s request to suppress this information, the request should be denied.

A. Introduction: the public discussion about lethal injection drugs and the Texas Public Information Act

As early as May of this year, media outlets were reporting a nationwide shortage of sodium thiopental, a short-acting anesthetic used by doctors in the induction phase of general anesthesia. In executions, Texas and other states use thiopental as the first drug in a three-drug protocol. It’s intended purpose is to anesthetize the inmate before the third drug causes death by stopping the heart. *See, e.g., Around the Nation*, Houston Chron, May 12, 2010 (reporting on shortage and its impact on scheduled Ohio execution). The media returned to this story in the last month. *See Mike Tolson, Texas has ample chemicals for executions, and it won’t lend lethal doses to other states*, Houston Chron, Sept. 28, 2010, at B1; *Texas well stocked with lethal injection drugs*, Huntsville Item, Sept. 29, 2010.

Meanwhile, “Hospira, the suburban-Chicago-based manufacturer of thiopental, has sent letters to states and to the media stating that it does not



support the use of its products in executions, instead referring to their legitimate medical uses.” *Arizona obtains drug supply for Oct. execution*, *The Arizona Republic*, Oct. 1, 2010, at B6. Indeed, some media outlets have reported that the shortage of sodium thiopental has impacted hospitals in need of this anesthetic for surgeries, due in part to shortages of other anesthetics. See Kevin Sack, *Shortage of Widely Used Anesthetics Is Delaying Executions in Some States*, *N.Y. Times*, Sept. 29, 2010 (reporting that “anesthesiologists were being forced to use less familiar medications” than sodium thiopental “that leave patients groggier and with a higher risk of nausea and headaches”). See also Jessie Holladay, *Ky. not alone in seeking drug for executions*, *the Courier Journal*, Aug. 28, 2010, at A1 (quoting attorney arguing that the drug in shortage should be reserved for medical procedures).

The natural outgrowth of this public discussion is the public’s desire to know how much sodium thiopental TDCJ possesses and other related information. Texas is the home to world-class medical facilities such as M.D. Anderson. While TDCJ has on hand “ample” sodium thiopental for executions, are hospitals going without? Precisely how much sodium thiopental TDCJ has is an important part of this discussion.

Thus, on August 31, 2010, an Associated Press reporter filed a Texas Public Information Act Request seeking the following information from TDCJ:

1. How much sodium thiopental do you currently have on hand?
2. When does it expire?
3. When did you last purchase it?
4. What efforts are you making to obtain more, including through any other state corrections departments?
5. What correspondence you have about the issue with Hospira, other possible suppliers, or any other state corrections agencies?
6. What plans do you have to try to use an alternative drug?

On September 15, 2010, a staff attorney from the Death Penalty Clinic at the University of California at Berkeley School of Law requested similar information. The Austin American Statesman recently requested this type of information as well. See Mike Ward, *Details on execution drugs should remain secret, prison officials say*, *AUSTIN AMERICAN STATESMAN*, Oct. 22, 2010.

The requested information is of obvious public concern and rightly

belongs to the public under the Public Information Act (The Act). Texas lawmakers passed the Act to provide public access to complete information about the affairs of the government and the official acts of public officials and employees. Tex. Gov't Code Ann. § 552.001. The Act strongly favors disclosure of public information and requires the governmental body to prove a valid exemption that relieves it of its ordinary duty to disclose. *Thomas v. Cornyn*, 71 S.W.3d 473, 488 (Tex.App.-Austin 2002, no pet.) (citing Tex. Gov't Code Ann. § 552.001 (requiring that Act be liberally construed in favor of granting requests for information), § 552.006 (prohibiting the withholding of public information except as expressly provided), § 552.302 (creating presumption, absent compelling reason, that information is public where governing body fails to request attorney general opinion)). Exceptions to the Act must be construed narrowly. See Tex. Gov't Code Ann. § 552.001(b); *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex.2000); *Envoy Med. Sys., L.L.C. v. State*, 108 S.W.3d 333, 336 (Tex.App.—Austin 2003, no pet.).

Thus, a governmental actor may suppress public information only if “(1) it is prohibited by statute from disclosing certain information and, therefore, that information is exempt from disclosure under section 552.101, or (2) the disclosure of the information implicates the constitutionally protected privacy interest of a party other than the governmental body.” *Doe v. Tarrant County Dist. Attorney's Office*, 269 S.W.3d 147, 155 (Tex. App. – Fort Worth 2008, no pet.).

Here, TDCJ claims both a constitutionally-protected privacy interest and statutory exemptions – the law enforcement exemption and an exemption for information concerning public employees. As shown below, these exemptions do not apply here and serve no basis for denying the public important information concerning Texas executions.<sup>1</sup>

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<sup>1</sup> As a “preliminary matter,” TDCJ states that its only information concerning the amount of sodium thiopental it has and its expiration date is contained on the labels on the drug’s vials. TDCJ Letter, 9-28-2010, at 2-3. It does not offer this as a justification for withholding the information, but requests the Attorney General’s “guidance as to whether photocopies of the labels must be taken of each vial and released, or whether the amount of sodium thiopental on hand must be counted, inventoried, reduced to writing, and divulged to the requestor.” *Id.* The Public Information Act provides TDCJ with at least two options for addressing this concern. First, TDCJ could simply make the labeled vials of sodium thiopental “available for inspection.” § 552.203 (1). Second, if TDCJ believes

B. TDCJ's Claimed Exemptions

1. *TDCJ's Alleged Common Law Right of Privacy*

TDCJ's first argument in support of exemption seeks to rely on the doctrine of common-law privacy. See TDCJ Letter, 9-28-2010, at 3-5. TDCJ argues that if the amount of sodium thiopental and its expiration date are disclosed, 1) death-row supporters and anti death-penalty groups could guess at when TDCJ's supply would expire; 2) "militant" death-penalty opponents could fire weapons or use knives outside the location of scheduled executions; and 3) that releasing the amount of sodium thiopental it possesses would "operate to inflame an already volatile situation as described above," with the result that "people could get serious injured or killed." TDCJ Letter at 4. These speculative arguments fall far short of establishing a common law right of privacy.

The common law right of privacy has an individual focus and is "limited to intimate personal relationships or activities, freedoms of the individual to make fundamental choices involving himself, his family, and his relationships with others." *Industrial Foundation of South v. Tex. Indus. Accident Bd. (Industrial Foundation)*, 540 S.W.2d 668, 679 (Tex. 1976). The right of privacy prohibits the disclosure of information when that information (1) concerns an individual's "private life," (2) is "highly offensive to a reasonable person of ordinary sensibilities," and (3) is "not of legitimate public concern." *Industrial Foundation*, 540 S.W.2d at 682; accord *Vandiver v. Star-Telegram, Inc.*, 756 S.W.2d 103, 106 (Tex. App. – Austin 1988) (combining the first and second requirements); accord *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, LP*, 287 S.W.3d 390, 394 (Tex. App. – Austin 2009) (also combining the first and second requirements).

TDCJ implicitly acknowledges that it does not meet the ordinary requirements for showing a common law right of privacy by failing to

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that disclosing the requested information "will require programming or manipulation of data," § 552.231 (a)(1) and otherwise meets the criteria of this provision of the law, § 552.231 (a)(2), TDCJ must then follow the Act's required procedure for addressing requests requiring manipulation of data. See § 552.231 (b). It has not done so. Thus, if the Attorney General determines that the exemptions TDCJ seeks are not valid, it should direct TDCJ to follow the Act's clear procedures for handling this request.



argue that the requested information concerns an individual's private life, is highly offensive, and is not of legitimate public concern. TDCJ, instead, relies on what has been called a "special circumstances exception." TDCJ Letter, 9-28-2010, at 3.

In *Tex. Dep't of Pub. Safety*, 287 S.W.3d at 394, the Third Court of Appeals considered the "special circumstances" exception the Attorney General has sometimes applied. This exception allows the governmental bodies who cannot show a common-law right of privacy nevertheless to withhold information upon a showing that releasing the information would result in an "an imminent threat of physical danger," as opposed to "a generalized and speculative fear of harassment or retribution." *Id.* (citing *Tex. Att'y Gen. ORD-169*, at 6). The Third Court of Appeals, however, rejected the argument that a "special circumstances" exception exists, adhering to *Industrial Foundation*, 540 S.W.2d at 686, in which the Supreme Court held that its common-law privacy test was to be the "sole criteria" for "the disclosure of information to be deemed wrongful publication of private information under common law." *Tex. Dep't of Pub. Safety*, 287 S.W.3d at 394 (citing *Industrial Foundation*). See also *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546 (Tex.App.—Austin 1983, *writ ref'd*) (same). Under these precedents, the "special circumstances exception" TDCJ seeks has no valid legal underpinning. It offers no basis for TDCJ to suppress this public information.

In any case, even by its own terms, this "special circumstances" exception does not apply here. As TDCJ concedes, the exception requires a showing of an "imminent threat of physical danger," not merely a "generalized and speculative fear of harassment or retribution." TDCJ Letter, 9-28-2010, at 3. TDCJ has paraded the horrible execution-day scene that it posits would follow from disclosure of the amount of sodium thiopental it possesses. But while the Attorney General must accept the facts presented by a governmental body, the governmental body here is not presenting facts but fanciful imaginings. In other words, TDCJ's parade of horrors is complete and utter speculation.

TDCJ also has shown no nexus between the mayhem it contends will ensue and the information requested. Executions have always been a matter of rigorous public debate. In recent years, members of the public have learned that Texas may have executed an innocent man, that the State's top criminal judge closed the court at 5pm on an execution day, and that the costs of executions are exorbitantly high

given more affordable and equally-safe alternatives. The public already has access to information that Texas has executed 463 people, <http://www.tdcj.state.tx.us/stat/executedoffenders.htm>, more than four times the number of any other state. *See, e.g.,* <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>. None of the many arguments against or for the death penalty – propelled by disclosed public information or otherwise – have resulted in what TDCJ now has suggested is “an imminent threat of physical danger.” TDCJ Letter, 9-28-2010, at 3.<sup>2</sup> TDCJ offers no explanation why disclosure of information about sodium thiopental will be any different

With respect to lethal injection, TDCJ has specifically told the media it has ample sodium thiopental to perform its scheduled executions. *See* Mike Tolson, *Two drugs in short supply Texas has ample chemicals for executions*, Houston Chron, Sept. 28, 2010, at B1; *Texas well stocked with lethal injection drugs*, Huntsville Item, Sept. 29, 2010. TDCJ fails to explain what additional – and violent – impact would result from disclosing the precise amount of sodium thiopental it possesses. Moreover, many facts of TDCJ’s lethal injection protocol itself have long been publicly available. *See, e.g., Ex parte O’Brien*, 190 S.W.3d 677, 680-81 (Tex.Crim.App. 2006). TDCJ has executed nearly 100 inmates since the *Ex parte O’Brien* decision on May 17, 2006, <http://www.tdcj.state.tx.us/stat/executedoffenders.htm>, none with any hint of the execution-day violence TDCJ now says is imminent.<sup>3</sup>

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<sup>2</sup> To buttress its case, TDCJ states that 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.” TDCJ Letter, 9-28-10, at 4. Of 463 executions TDCJ has performed since 1982, only one resulted in a reported group of armed militants protesting outside the execution chamber. That was the controversial and racially-charged execution in 2000 of Gary Graham, a black man, whose supporters argued he was innocent of killing his white victim. *See* John Moritz, *Debate continues as Texas marks 25 years of using lethal injection*, Ft. Worth Star-Telegram, Dec. 2, 2007, at A18 (recounting various “notable” executions, including that of Gary Graham in June of 2000, where New Black Panthers protested). And not even this unusual execution resulted in any reported violence or harm. That TDCJ relies on an unusual execution more than ten years ago to argue “imminent” harm only highlights the weakness of its position.

<sup>3</sup> TDCJ General Counsel, Melinda Bozarth, is on record saying that though “security concerns could arise at any time, . . . she is not aware of any new threats or issues with protestors.” *See* Mike Ward, *Details on execution drugs should*

Tellingly, while positing that the threat of violence is imminent, TDCJ is unable to cabin its prediction of violence any narrower than a laundry-list of potential spectators who could be present at any given execution. TDCJ Letter, 9-28-2010, at 4-5 (listing various potential spectators and attendees).

In short, neither the common law right of privacy nor the “special circumstances exception” TDCJ relies on prohibits disclosure of the amount of TDCJ’s sodium thiopental. The right of privacy focuses on a specific individual’s privacy concerns. *Industrial Foundation*, 540 S.W.2d at 679. The disclosure of the amount of sodium thiopental does not implicate any individual privacy concerns. There is no special circumstances exception. But even if there is, the disclosure of this information would not target any individual and certainly poses no threat of imminent harm. If anything, TDCJ has presented “a generalized and speculative fear of” violence falling far short of the special circumstances exception it seeks. TDCJ Letter, 9-28-2010, at 3.

## 2. *TDCJ’s Alleged Public Employee Exception*

Incorporating by reference its right to privacy/special circumstances argument, TDCJ argues that “employees on duty at the Huntsville Unit on the date of a scheduled execution” would face a “substantial threat of physical harm” if TDCJ released the requested information. TDCJ Letter, 9-28-2010, at 5.

TDCJ cites Section 552.151, which bars disclosure of information that relates to an employee or officer of the government, if such disclosure would subject the employee or officer to a substantial threat of physical harm.

The requests at issue do not seek *any* information related to state employees or officers. This exception thus does not apply. Moreover, as shown, the harm TDCJ says will occur is based on wild speculation.

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*remain secret, prison officials say*, AUSTIN AMERICAN STATESMAN, Oct. 22, 2010. TDCJ’s speculation about what “could” happen does not establish imminent harm. Indeed, this same article reported that, “Two other prison officials said few protestors show up for most executions and there have been no threats or violence, even arrests, in years. The officials asked not to be identified because they are not authorized to speak about security issues.” *Id.*

### 3. *TDCJ's Alleged Law Enforcement Exemption*

Citing Section 552.108 (b)(1), TDCJ claims that it need not release the amount of sodium thiopental it possesses under the “law enforcement” exception because such release would “interfere with law enforcement or prosecution.” TDCJ Letter, 9-28-2010, at 5-6. “In order to secure the protection of this exception, the governmental body must demonstrate that release of the requested information will unduly interfere with law enforcement and crime prevention.” *City of San Antonio v. San Antonio Exp.-News*, 47 S.W.3d 556, 565 (Tex.App.—San Antonio 2000, no pet) (citing *Ex parte Pruitt*, 551 S.W.2d 706, 709-10 (Tex.1977)). Here, again, TDCJ relies on mere conjecture to make its case. It fails to show how disclosing the requested information would interfere with law enforcement, much less unduly interfere with it.

TDCJ speculates that if “the amount of sodium thiopental that we currently have and its expiration date 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.” TDCJ Letter, 9-28-2010, at 6. The inmate, so the argument goes, “could keep playing this game until our supply of sodium thiopental has either expired or was exhausted.” *Id.* at 6-7.

TDCJ has executed 463 inmates since 1982. <http://www.tdcj.state.tx.us/stat/executedoffenders.htm>. It alleges not a single instance of an inmate – or his “more militant” confederates – successfully disrupting and preventing his execution. If doing so were as easy as TDCJ has suggested, inmates could avoid executions altogether merely by disrupting each of their scheduled executions indefinitely.

Before the State of Ohio executed Michael Beuke on May 13, 2010, it publicized that it had only a single dose of sodium thiopental to execute him. *See Around the Nation*, Houston Chron, May 12, 2010. Ohio carried out this execution without incident. *See Jessie Holladay, Ky. not alone in seeking drug for executions*, the Courier Journal, Aug. 28, 2010, at A1.

Similarly, nearly three weeks before Oklahoma’s execution of Ray Wackerly on October 15, 2010, the media had reported that Oklahoma only






possessed a single dose of sodium thiopental – which it had to borrow from another state. *See* Michael Baker, *2 men scheduled to be put to death but state has only 1 dose of sedative*, *Oklahoman*, Sept. 25, 2010, at 1A.. Oklahoma, too, carried out this execution without any problem. *See* Jeff Arnold, *Muldrow Murderer Executed*, *Times Record*, Oct. 15, 2010.

Other states too have disclosed to the public not only the amount of sodium thiopental they have on hand, but that they have only enough for one execution. *See* *Arizona obtains drug supply for Oct. execution*, *The Arizona Republic*, Oct. 1, 2010, at B6; Jessie Holladay, *Ky. not alone in seeking drug for executions*, *the Courier Journal*, Aug. 28, 2010, at A1 (disclosing that Kentucky possesses only 9.5 grams of sodium thiopental); *State restocks key execution drug*, *L.A. Times*, Oct. 7, 2010 (California Attorney General publicly discloses it has obtained 12 grams sodium thiopental for execution). No incidents have been reported as a result of these disclosures.

While the Texas Public Information Act has exceptions, including the law enforcement exception, it reflects a “strong. . . public policy favoring public access to governmental information.” *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000). TDCJ does not come close to justifying suppression of this public information with its wild speculation. Its request to do so should be denied.

Sincerely,

  
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