



July 27, 2021

The Honorable Ken Paxton, Attorney General
Attn: Open Records Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

Via E-File

RE: Appeal of Withholding Public Records by TDCJ – OGC #AL0148

Dear Office of the Attorney General:

We write on behalf of the American Civil Liberties Union of Texas (“ACLU of Texas”) to respond to the letter submitted by the Texas Department of Criminal Justice (“TDCJ” or “the Department”) on June 23, 2021, which justified withholding documents that are rightly public information and should be released pursuant to the Texas Public Information Act (“TPIA”), Texas Government Code Ch. 552. To date, we have received no responsive information from TDCJ even though the Department released a statement to the media with information covered by our request. *See* Juan A. Lozano, *Agency: Texas Execution Held Without Media Was ‘Inexcusable’*, AP (June 24, 2021), <https://bit.ly/3ehJ9Wp> (describing TDCJ’s findings from their investigation on the lack of media witnesses at the execution of Quintin Jones).

Consistent with its repeated attempts to obfuscate information critical to accountability, TDCJ provides scant information about the responsive records. The letter does make one thing clear: TDCJ has failed to meet its statutory burden of demonstrating that the claimed exemptions justify withholding the records. Some of the claimed exemptions do not apply to the responsive records, and others could be addressed through targeted redactions rather than blanket withholding. Accordingly, we ask that you deny TDCJ’s request to withhold the responsive records and order their prompt release.

I. Background

Texas executed Quintin Jones on May 19, 2021 with no media witnesses present. Jolie McCullough, *For the First Time in More Than 40 Years, Media Were Not Allowed to Witness a Texas Execution*, Tex. Trib. (May 20, 2021), <https://bit.ly/3i6lJ7v>. The execution was the first in Texas’s modern death-penalty era carried out without media witnesses. *Id.* TDCJ apologized for its “critical error,” promising an investigation to “ensure it does not happen again,” but providing no details. *Id.*

Accountability and transparency are especially important here where the First Amendment guarantees the public and the press the right to witness executions. *See First Amend. Coal. Of*

Arizona, Inc. v. Ryan, 938 F.3d 1069, 1075 (9th Cir. 2019). Media access at executions is necessary “so that the public can determine whether lethal injections are fairly and humanely administered.” *Id.* at 1076.

The ACLU of Texas promptly filed a TPIA request with the Department on June 4, 2021. *See* Letter from Savannah Kumar & Adriana Piñon, ACLU of Texas, to Bryan Collier, Exec. Dir., TDCJ, Re: Texas Public Information Act Request (June 4, 2021) (Exhibit A) [hereinafter Request]. We submitted this request to understand the circumstances that led to the media’s exclusion from the execution, in the hope that public accountability would help bring about the Department’s stated goal: to “ensure that it does not happen again.” We requested several categories of information tailored to this purpose, including:

- (1) Any and all information regarding policies, practices, and procedures related to media access to executions conducted in TDCJ facilities.
- (2) Redacted information concerning staff involved in media access to the execution of Quintin Jones. This information should not include the names or personal information of individuals involved in arranging media access to the execution, but should contain: the individuals’ job title, the dates they received execution-related trainings, and whether they had previously participated in an execution at a TDCJ facility.
- (3) Any and all training and resource materials provided to individuals involved in planning or supervising media access to the execution of Quintin Jones, including, but not limited, to the following personnel: personnel responsible for alerting media witnesses about the timing of the execution; personnel responsible for escorting media witnesses to the appropriate witness rooms; the Huntsville Unit Warden and/or Warden’s designee; the Death Row Supervisor.
- (4) A copy of the completed Execution Packet assembled by the Death Row Unit for Quintin Jones’s execution as required by the execution protocol updated April 2021.
- (5) A list of all media witnesses waiting to be escorted to the appropriate witness rooms on May 19, 2021 in advance of Quintin Jones’s execution.
- (6) All communications between TDCJ and media witnesses selected to attend Quintin Jones’s execution.
- (7) Any and all TDCJ policies, protocols, or procedures guiding the selection of three additional print media or broadcast media representatives who are chosen to serve as witnesses from a list of applicants in accordance with Tex. Admin. Code Rule § 152.51(d)(7)(C).
- (8) Any documents containing the full list of media witness applicants maintained by the TDCJ Public Information Office as required by Tex. Admin. Code Rule § 152.51(d)(7)(C).
- (9) All communications among TDCJ staff concerning the failure to provide media access to the Quintin Jones execution.
- (10) All internal and/or external investigations of TDCJ’s failure to ensure media access to the Quintin Jones execution.

Despite its promises to investigate, TDCJ has sought to block public accountability at every turn. The Department filed a one-page letter with your office on June 16, 2021 claiming that the requested documents “contain information that is excepted from” TPIA’s disclosure mandate and invoking nearly every exemption in the statute, including exemptions that plainly do not apply to

the responsive documents. Letter from Erik Brown, Dir. Legal Affs., TDCJ, to Hon. Ken Paxton, Texas Att’y Gen., Re: Public Information Request Submitted by Savannah Kumar—OGC#AL0148 (June 16, 2021) (Exhibit B). Perhaps recognizing its untenable position, the Department narrowed its claims in a June 23, 2021 follow-up letter. That letter asserted that the information in the records was confidential under eight exemptions to the TPIA and therefore “not subject to release.” Letter from Erik Brown, Dir. Legal Affs., TDCJ, to Hon. Ken Paxton, Texas Att’y Gen., Re: Public Information Request Submitted by Savannah Kumar—OGC#AL0148 (June 23, 2021) (Exhibit C) [hereinafter June 23 Letter].

We now respond to that letter.

II. The Responsive Records Are Presumed Public

The Texas Public Information Act was passed to give the public “at all times . . . complete information about the affairs of government and the official acts of public officials and employees.” Tex. Gov’t Code § 552.001(a). To that end, the statute establishes a strong presumption in favor of disclosure: records are public unless a particular exemption applies. *See* Open Records Decision 363 at 1 (1983) (explaining that records must be disclosed “unless they fall within one of the particular exceptions applicable”); Open Records Decision 91 at 2 (1975) (“The Act makes all information public unless excepted.”). These exemptions “should be construed narrowly.” *Arlington Indep. Sch. Dist. v. Tex. Att’y Gen.*, 37 S.W.3d 152, 157 (Tex. App. 2001).

When a government body like TDCJ invokes an exemption, it is that body’s burden to demonstrate that the exemption in fact applies to the information at hand. *See Thomas v. Cornyn*, 71 S.W.3d 473, 480-81 (Tex. App. 2002). If the TDCJ “does not establish how and why an exception applies to the requested information, the attorney general has no basis on which to pronounce it protected.” Off. of the Att’y Gen., Public Information Act Handbook 43 (2020) [hereinafter TPIA Handbook]. This burden is heavy, since the statute is to be “liberally construed in favor of granting a request for information.” Tex. Gov’t Code § 552.001(b); *see also Arlington Indep. Sch. Dist. v. Tex. Att’y Gen.*, 37 S.W.3d 152, 157 (Tex. App. 2001) (“Liberal construction of [TPIA] may require disclosure even in instances where inconvenience or embarrassment may result.”).

Crucially, government bodies like TDCJ may not use exemptions that apply to particular pieces of information to justify withholding an entire document or set of documents. Your office emphasized this point in its TPIA Handbook, which tells agencies that: “[a] general claim that an exception applies to an entire report or document, when the exception clearly does not apply to all information in that report or document, does not conform to [TPIA].” TPIA Handbook at 42. This posture reflects language in the statute itself, *see* Tex. Gov’t Code § 552.301(e)(2) (instructing agencies to “indicate which exceptions apply to which *parts*” of responsive documents) (emphasis added), and numerous open records decisions, *see* Open Records Decision 150 at 2 (1977) (“A general claim that an exception applies to an entire file or report, when the exception clearly is not applicable to all of the information in the file or report, simply does not comport with the procedural requirements of the Act.”); Open Records Decision 419 at 3 (1984) (similar); Open Records Decision 252 at 2 (1980) (similar). Exemptions, therefore, must be narrowly construed,

substantiated by TDCJ, and carefully applied to only the pieces of information that they cover. Everything else in the responsive documents is public.

III. The Claimed Exemptions Do Not Justify Withholding the Responsive Records

Given TPIA's presumption of disclosure, the Department must demonstrate that a particular statutory exemption applies if it wishes to withhold information. It has failed to do so. The eight exemptions claimed by TDCJ in its June 23 letter either do not apply to the requested materials, or apply only to narrow categories of information that could be excised from the records with targeted redactions. Your office should reject TDCJ's attempt to parlay minor objections into wholesale withholding.

A. Information Confidential by Law (§ 552.101)

TDCJ argues that TPIA's exemption of "information considered to be confidential by law," Tex. Gov't Code § 552.101, "encompasses the doctrine of common law privacy," June 23 Letter at 1, but the information TDCJ attempts to withhold fails to meet this test because of the substantial public interest in the information. This doctrine protects information that both "contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person" and "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); *see also* Open Records Decision 659 at 5 (1999) (applying this test). But this doctrine's sweep is substantially cabined by the test's public interest prong.

To begin with, the standard for "highly embarrassing and intimate facts" is high. Disclosures that meet this bar are often deeply intimate medical, financial, or family information. *See* Open Records Decision 659 at 5 (1999) (cataloguing the categories of information that have been withheld under this standard).

More importantly, the second prong of the test—that the information be of no legitimate value to the public—weighs strongly in favor of disclosure in most cases. "Because much of the information that a governmental body holds is of legitimate concern to the public, the doctrine of common-law privacy frequently will not exempt information that might be considered 'private.'" TPIA Handbook at 73. Financial information, for example, might meet the first prong of the test, but it fails the second "when the information concerns the essential facts about a financial transaction between an individual and a governmental body" because the public has an interest in that information. Open Records Decision 684 at 3 (2009). The records here relate to a matter of substantial public interest—the near-unprecedented denial of media observation during the state's exercise of its gravest power. Accordingly, this exemption will apply only to the narrowest subset of the responsive records, if it applies to them at all.

B. Litigation-Related Information (§ 552.103)

TDCJ also incorrectly relies on the litigation exception to withhold the information at issue because litigation concerning media access to executions is wholly speculative. TPIA exempts "information relating to litigation of a civil or criminal nature to which" the state, a state agency,

or a state employee is or may be a party, but only “if the litigation is pending or reasonably anticipated on the date” the request is submitted. Tex. Gov’t Code § 552.103. The exemption is meant “to prevent parties in litigation from obtaining documents outside of discovery,” and it covers only “(1) information relating to litigation, (2) that is either pending or reasonably anticipated.” *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App. 2002); *see also* Open Records Decision 677 at 2 (2002) (“A governmental body asserting the exception carries the burden of clearly establishing both prongs of this test.”). The Department has failed to make this showing.

TDCJ offers no concrete evidence that information in the responsive records “relat[es] to litigation,” or even that *any* litigation touching on the records was “pending or reasonably anticipated” at the time the request was made. This falls well short of the requirement that agencies show more than “mere conjecture” or “the mere chance” of litigation by demonstrating that “particular steps towards filing suit have occurred.” Open Records Decision 677 at 3 (2002); *see also* Open Records Decision 561 at 10 (1990) (finding that the exemption does not apply “merely because a legal remedy exists”). For our part, the ACLU of Texas had no pending litigation related to the denial of media access against the TDCJ at the time the request was filed, nor did the Department have any basis for “reasonably anticipat[ing]” such litigation. And even if any litigation were pending, TDCJ “must identify the issues in the litigation and explain how the information relates to those issues.” Handbook at 82. It has not.

C. Interference with Law Enforcement or Prosecution (§ 552.108)

TDCJ fails to demonstrate with any specificity the danger it claims would result from releasing this information as is required by this exception. However, even if it did, its contention that release is dangerous is wholly undercut by its release of this, or substantially similar, information to the media. TPIA exempts “internal record[s] or notation[s] of a law enforcement agency or prosecutor that [are] 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.” Tex. Gov’t Code § 552.108(b). TDCJ argues that this exemption covers “information about the minutia of prison operations that would compromise prison security,” and that the Department should get “a great deal of deference as to what constitutes a security threat to a prison facility.” June 23 Letter at 2-3. But that deference is not unlimited and TDCJ has failed to demonstrate any such threat.

Decisions applying the exemption to prisons and jails show this office carefully assessing agency claims of danger. One decision found that dates of prisoner transfers could not be withheld after the transfer took place, since any security concerns raised by pre-transfer disclosure did not apply once the transfer had occurred and “the public has a legitimate interest in knowing the . . . transfer of arrestees and prisoners.” Open Records Decision 508 at 3 (1988). Another found that a jail’s “arrest sheet” must be released because it reveals information made public elsewhere. Open Records Decision 394 at 1-2 (1983).

While TDCJ opposes disclosing the records in response to the ACLU of Texas’s TPIA request, the Department has selectively released the same or analogous information to the media. *See* Juan

A. Lozano, *Agency: Texas Execution Held Without Media Was ‘Inexcusable’*, AP (June 24, 2021).¹ TDCJ’s statement to the media explained that a “culmination of factors caused the incident which was preventable and inexcusable.” *Id.* In addition, the statement revealed that “specific responsibilities for individuals participating in the process were not clearly defined” and the “hyper-focus on the new spiritual advisor procedures led to confusion and breakdown in communication.” *Id.* TDCJ shared this information with the media without providing any information in response to the ACLU of Texas’s TPIA request.

The decision on which TDCJ relies fails to bolster its argument. That decision blocked the release of a sketch depicting the planned “deployment of law enforcement officers, security personnel and pedestrian and vehicle barricades” for an upcoming execution. Open Records Decision 413 at 2 (1984). But this information was directly related to operations at an upcoming execution, rather than a description of general prison policy or a past execution. What’s more, the prison made detailed claims about the operational value of the information in the sketch and the “several crowd control incidents that taxed the ability of local law enforcement agencies to maintain order.” *Id.* TDCJ has made no similar showing here.

D. Information Identifying Execution Participants (§ 552.1081)

This exception regarding identifying information does not apply because we expressly did not seek information covered by it. TPIA exempts identifying information of “any person who participates in an execution procedure, including a person who uses, supplies, or administers a substance during the execution” from disclosure, Tex. Gov’t Code § 552.1081(1), and TDCJ asserts that the responsive records contain “specific identifying information of TDCJ employees who participate in the execution process,” June 23 Letter at 3. But we refrained from asking for any “specific identifying information.”

As an initial matter, unless the same individuals “involved in media access to the execution,” Request at 1, were also responsible for “us[ing], supply[ing], or administer[ing]” the lethal injection, Tex. Gov’t Code § 552.1081(1), the exception would not apply. More importantly, though, we did not request the type of information covered by the exemption. The request specifically asked for “names or personal information” to be redacted. Request at 1. This is exactly the sort of information contemplated by § 552.1081, which references the Texas Code of Criminal Procedure’s definition of “name, address, and other identifying information.” Tex. Code Crim. Proc. Art. 43.14. The other information we requested—including job titles and information on previous training and execution participation—does not fall within the scope of this exemption.

E. Agency Memoranda (§ 552.111)

TDCJ incorrectly asserts this agency memoranda exception broadly and fails to address why targeted redaction of non-exempted information would not suffice to protect agency policymaking. TPIA exempts “interagency or intraagency memorand[a] or letter[s] that would not be available by law to a party in litigation with the agency.” Tex. Gov’t Code § 552.111. TDCJ assigns a broad

¹ It is also our understanding that the death watch log of John Hummel—who was executed in June—has been made public. *See* Death Watch Log (June 30, 2021), <https://bit.ly/3kAq2Le>. This log is similar to the log we requested as part of the “completed Execution Packet.” Request at 2.

sweep to this provision, arguing that it exempts “advice, opinion, or recommendations on policymaking matters” including “administrative and personnel matters of broad scope that affect the governmental body’s policy mission.” June 23 Letter at 3. But this characterization glosses over limits on the exemption imposed by this office and Texas courts.

Though the exemption is modeled on FOIA exemption 5, 5 U.S.C. § 552(b)(5) (2018), Texas courts have “declined to interpret the agency memoranda exception of the Act as broadly as its federal counterpart.” *Arlington Indep. Sch. Dist. v. Tex. Att’y Gen.*, 37 S.W.3d 152, 158 (Tex. App. 2001). Even the case cited by the TDCJ, *City of Garland v. Dallas Morning News*, supports a narrower reading of the exemption than that advanced by the Department. 22 S.W.3d 351 (Tex. 2000). At its widest sweep, the exemption only protects material that is “predecisional and deliberative”—material that, in other words, was both “prepared in order to assist an agency decisionmaker in arriving at his decision,” *id.* at 361 (quoting *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975)), and that reflects the “give-and-take of the consultative process,” *id.* (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). Even then, the exemption only applies to a subset of predecisional and deliberative materials: those “that relate to the agency’s policymaking.” *Id.* at 364; *see also* Open Records Decision 615 at 5 (1993) (finding that “information must be related to the *policymaking* functions of the governmental body” to fall under the exemption). The court emphasized TPIA’s “strong statement of public policy favoring public access” and determined that “exempt[ing] all information except postdecisional or purely factual information . . . would allow the exception to swallow the Act.” *City of Garland*, 22 S.W.3d at 364. So while TDCJ is correct that the exemption applies only to “matters of broad scope that affect the governmental body’s policy mission,” Open Records Decision 631 at 3 (1995), it ignores the way that this requirement narrows the “predecisional and deliberative” test to create a sharply limited exemption.

In the narrow circumstances where the exemption applies, TDCJ must still carefully separate the portions of each record containing covered material from the rest of the document. Though this process may be less rote than the redaction of credit card or Social Security numbers, claims that a document is so “permeated with recommendation and advice causing almost all of it to be protected” are unavailing. Attorney General Opinion H-436 at 3 (1974). Often, “recommendations consist only of a sentence or two” and can be redacted while disclosing the rest of the document. *Id.*; *see also* Open Records Decision 615 at 5-6 (1993) (noting that the exemption does not cover “purely factual information that is severable from the opinion portions of internal memoranda”); Open Records Decision 419 at 3-4 (1984) (exempting recommendation portions of a report but disclosing the rest).

F. Credit and Debit Card Numbers (§ 552.136)

TDCJ wrongly withholds entire documents based on this credit and debit card exception rather than redacting information on documents that properly falls under it. TPIA exempts any “credit card, debit card, charge card, or access device number[s]” in government records from disclosure, Tex. Gov’t Code § 552.136(b), and TDCJ claims that the responsive records contain the “trust fund account information” of incarcerated individuals, June 23 Letter at 4. We do not seek this trust account information and agree to its redaction. We do not agree, however, to the blanket withholding of the responsive records—very few of which should contain trust fund account

numbers given the categories enumerated in the request—because it goes well beyond the scope of this exemption. Such redactions were indeed expressly contemplated by the statute and TDCJ must redact and release documents to comply with its obligation under the law. Tex. Gov’t Code § 552.136(c).

G. Email Addresses (§ 552.137)

Once again, TDCJ inappropriately applies this exception to withhold entire documents instead of redacting the excepted information relating to certain email addresses. We agree with the TDCJ that reporters’ email addresses may be withheld. *See* Tex. Gov’t Code § 552.137 (exempting “e-mail address[es] of a member of the public . . . provided for the purpose of communicating electronically with a governmental body” from disclosure unless certain circumstances apply). Email addresses of government employees or bodies, however, must be released, since the exemption “is not applicable to an institutional e-mail address, an internet website address, or an e-mail address a governmental body provides for the use of its officials or employees.” Open Records Decision 684 at 10 (2009).

Once again, targeted redaction rather than wholesale withholding is the appropriate course. This approach was modeled in an open records decision from 2009, where this office attached “sample markings that demonstrate the application of” the exemption; these markings redacted the email addresses of private individuals while releasing those of government officials and, more importantly, the substance of the document itself. *See* Open Records Decision 684 at 10, App’x E (2009). The TDCJ should follow this example.

H. Public Employee Personal Safety (§ 552.152)

TDCJ cannot rely on this public employee personal safety exception because we do not seek names and identifying information of any employees and because it failed to substantiate the harm it believes may fall to employees sufficient to justify withholding information under this exception. TPIA exempts from disclosure any information about a government employee that “under the specific circumstances pertaining to the employee or officer . . . would subject the employee or officer to a substantial threat of physical harm.” Tex. Gov’t Code § 552.152. The TDCJ argues that the responsive records contain “specific identifying information pertaining to TDCJ employees involved in some aspect of the execution process” and that their release therefore subjects them to a substantial threat of harm. June 23 Letter at 5. But our request excludes the names and identifying information of employees involved in the execution, *see* Request at 1, and the Department’s claims of potential harm are far too speculative to justify withholding.

One interpretation of this exemption illustrates the weakness of TDCJ’s claims. This decision determined that travel records for the governor’s security detail should be withheld. Open Records Letter 2014-02048 at 4 (2014). In that case, the agency enumerated specific ways in which disclosure would subject the governor to harm—by revealing the number of agents in the detail and their tactics, the records “would allow someone to detect patterns in these travel arrangements.” *Id.* at 3. But the asserted danger in that case, while speculative, is far clearer than the conjecture advanced by TDCJ. All the Department can say in its letter on whether disclosure would subject employees to physical harm is that is “believes it does.” June 23 Letter at 5. While

“deference must be afforded . . . law enforcement experts about the probability of harm . . . vague assertion of risk will not carry the day.” *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P.*, 343 S.W.3d 112, 119 (Tex. 2011). The Department cannot use thin speculation about potential harm to withhold the responsive records.

IV. TDCJ’s Reliance on Confidentiality is Unavailing

Throughout its letter, TDCJ notes that it has withheld parts of its briefing from the public “[d]ue to the confidential nature” of the requested materials. June 23 Letter at 2-5. But rather than support this conclusion with any level of granularity, it merely parrots statutory language or legal standards without even explaining how they apply to particular responsive records. These are precisely the types of “[c]onclusory assertions” that your office claims “will not suffice” to invoke TPIA’s exemptions. TPIA Handbook at 43. Though the Department may withhold “comments [that] disclose or contain the substance of the information requested,” Tex. Gov’t Code § 552.301(e-1), it may not “redact[] more than that,” TPIA Handbook at 40. While we cannot know what information TDCJ’s confidential briefing contains, the dearth of analysis in the letter indicates that the Department has withheld more than necessary.

For the reasons described above, the requested materials are not exempted from disclosure under the TPIA and they should be immediately released. We ask you do not permit TDCJ to fail to meet its responsibility under the TPIA in this matter.

Sincerely,

/s/ Savannah Kumar

Savannah Kumar
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EXHIBIT A



June 4, 2021

Bryan Collier, Executive Director, TDCJ

TDCJ Public Information Request

PO Box 4017

Huntsville, TX 77342

PIA@tdcj.texas.gov

Re: Texas Public Information Act Request

Dear Director Collier,

We submit this Public Information Act Request to seek information regarding the lack of media witnesses at the execution of Quintin Philippe Jones on May 19, 2021 at the Huntsville Unit of TDCJ.

This letter constitutes a request pursuant to the Texas Public Information Act ("TPIA"), Texas Government Code Ch. 552. This request is made for public and non-commercial purposes by the American Civil Liberties Union of Texas ("ACLU of Texas").¹ We request the following information maintained by the Texas Department of Criminal Justice ("TDCJ"):

1. Any and all information² regarding policies, practices, and procedures related to media access to executions conducted in TDCJ facilities.
2. Redacted information concerning staff involved in media access to the execution of Quintin Jones. This information should not include the names or personal information of individuals involved in arranging media access to the execution, but should contain: the individuals' job title, the dates they received execution-related trainings, and whether they had previously participated in an execution at a TDCJ facility.

¹ The ACLU of Texas, a 501(c)(3) organization, is dedicated to protecting and defending the individual rights and liberties guaranteed by the Constitution and laws. The ACLU of Texas monitors government conduct, provides free legal representation in civil rights and civil liberties cases, educates the public about their rights and liberties and abuses of power, and provides analyses to the public of government activities and their civil rights implications.

² The term "information" as used in this request includes all records or communications in written or electronic form, including but not limited to correspondence, circulars, directives, documents, data, emails, faxes, logs, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, policies, procedures, protocols, reports, rules, training manuals, other manuals, or studies.

3. Any and all training and resource materials provided to individuals involved in planning or supervising media access to the execution of Quintin Jones, including, but not limited, to the following personnel:
 - a. personnel responsible for alerting media witnesses about the timing of the execution;
 - b. personnel responsible for escorting media witnesses to the appropriate witness rooms;
 - c. the Huntsville Unit Warden and/or Warden's designee;
 - d. the Death Row Supervisor.
4. A copy of the completed Execution Packet assembled by the Death Row Unit for Quintin Jones's execution as required by the execution protocol updated April 2021.
5. A list of all media witnesses waiting to be escorted to the appropriate witness rooms on May 19, 2021 in advance of Quintin Jones's execution.
6. All communications between TDCJ and media witnesses selected to attend Quintin Jones's execution.
7. Any and all TDCJ policies, protocols, or procedures guiding the selection of three additional print media or broadcast media representatives who are chosen to serve as witnesses from a list of applicants in accordance with Tex. Admin. Code Rule §152.51(d)(7)(C).
8. Any documents containing the full list of media witness applicants maintained by the TDCJ Public Information Office as required by Tex. Admin. Code Rule §152.51(d)(7)(C).
9. All communications among TDCJ staff concerning the failure to provide media access to the Quintin Jones execution.
10. All internal and/or external investigations of TDCJ's failure to ensure media access to the Quintin Jones execution.

In the interest of open government, please be mindful of your duty to make a good-faith effort to relate these requests to any information that you hold. The next scheduled execution in Texas is set for June 30, 2021. We ask that you respond to this request within the next 7 days in light of the urgency of the matter.

The Texas Public Information Act mandates that if you are unable to produce the requested information within 10 business days of this request, you certify that fact in writing and set a date within a reasonable time when the information will be available. Should you elect to withhold or delete any information, please justify your decision by referencing specific exemptions under the Act. Under provisions of the Texas Public Information Act, we reserve the right to appeal should you determine to withhold any information sought in my request.

This request is made for public and non-commercial purposes by the American Civil Liberties Union Foundation of Texas, which is a nonprofit organization whose mission is to defend and preserve individual rights and liberties guaranteed to every person in this country by the Constitution and laws of the United States. Because we request this information for the benefit of the general public, please waive the fees for this request pursuant to Tex. Gov't Code § 552.267.

To the extent possible, we request that this information be provided electronically. Materials may be sent by email to skumar@aclutx.org and apinon@aclutx.org and by fax to (713) 942-8966, or by mail to P.O. Box 8306, Houston, Texas, 77288.

Please do not hesitate to contact us by email at skumar@aclutx.org and apinon@aclutx.org if you need any clarification or have any questions or concerns. Thank you for your assistance in this matter.

Sincerely,

/s/ Savannah Kumar

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EXHIBIT B



Texas Department of Criminal Justice

Bryan Collier
Executive Director

June 16, 2021

Honorable Ken Paxton
Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, TX 78711-2548

RE: Public Information Request Submitted by Savannah Kumar – OGC#AL0148

Dear Mr. Attorney General:

On June 4, 2021, the Texas Department of Criminal Justice (TDCJ) received a request under Chapter 552 of the Texas Government Code, the *Public Information Act* (PIA) from Savannah Kumar. A copy of the request and the notification letter sent to the requester is attached as *Attachment A*.

The TDCJ asserts documents responsive to this request contain information that is excepted from disclosure under the PIA. Specifically, the TDCJ invokes all of the exceptions provided by, and the exceptions incorporated into, Texas Government Code sections 552.028 and 552.101 through 552.158 of the PIA. Accordingly, we request a decision as to whether the exceptions apply.

To assist in your review, the TDCJ will provide written comments and the responsive documents, or a representative sample of the responsive documents, no later than the 15th business day from the date the request was received.

If additional information is needed, please contact this office at 936-437-6700 or via email at ogcopenrecords@tdcj.texas.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read "Erik Brown".

Erik Brown
Director of Legal Affairs

ECB/AML
Attachment

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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EXHIBIT C



Texas Department of Criminal Justice

Bryan Collier
Executive Director

June 23, 2021

Honorable Ken Paxton
Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, TX 78711-2548

RE: Public Information Request Submitted by Savannah Kumar – OGC#AL0148

Dear Mr. Attorney General:

I. BACKGROUND

On June 4, 2021, the Texas Department of Criminal Justice (TDCJ) received from Savannah Kumar a request for information regarding the lack of media witnesses at the execution of Quintin Philippe Jones on 05/19/21 at the Huntsville Unit of TDCJ.

The TDCJ submitted to your office a request for decision and a copy of the request on June 16, 2021, asserting the responsive records contain information excepted from disclosure under the Public Information Act (PIA).

Attached for your review and ruling are the responsive records and the TDCJ's assertion that the information is confidential under sections 552.101, 552.103, 552.108, 552.1081, 552.111, 552.136, 552.137, 552.152 of the Government Code. Accordingly, the TDCJ withdraws the assertion to all other exceptions previously raised.

Because the responsive records are voluminous and repetitive, some of the submitted information is a representative sample, as provided by section 552.301(e)(1)(D) of the Government Code.

II. SECTION 552.101. EXCEPTION: CONFIDENTIAL BY LAW

Section 552.101 of the Government Code provides as follows:

Information is excepted from the requirements of Section 552.021 if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision.". 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).

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

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Due to the confidential nature, additional comments pertaining to the foregoing exception are set out in the confidential portion of our brief, as provided by section 552.301(e-1) of the Government Code. *See Attachment A.*

III. SECTION 552.103. EXCEPTION: LITIGATION OR SETTLEMENT NEGOTIATIONS INVOLVING THE STATE OR A POLITICAL SUBDIVISION

Section 552.103(a) of the Government Code excepts from required public disclosure:

(a) Information is excepted from the requirements of Section 552.021 if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

Section 552.103(c) of the Government Code provides as follows:

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Section 552.103 was intended to prevent the use of the PIA as a means for avoiding the rules of discovery used in litigation (JM-1048, 1989). The exception enables the governmental body to protect its position in litigation by forcing parties to acquire information relating to that litigation through discovery procedures (ORD No. 551, 1990). As was noted in *Heard v. Houston Post Co.*, 684 S.W. 2d 210 (Tex. App.-Houston [1st Dist.] 1984 ref'd n.r.e.), this section of the PIA excepts information from disclosure if (1) litigation involving the governmental body is pending or reasonably anticipated and (2) the requested information relates to that litigation.

Due to the confidential nature, additional comments pertaining to the foregoing exception are set out in the confidential portion of our brief, as provided by section 552.301(e-1) of the Government Code. *See Attachment A.*

IV. SECTION 552.108. EXCEPTION: CERTAIN LAW ENFORCEMENT, CORRECTIONS, AND PROSECUTORIAL INFORMATION

Section 552.108 of the Government Code provides 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;

The TDCJ is a law enforcement agency for purposes of section 552.108(b)(1). *See* Open Records Decision (ORD) No. 413 (1984) (interpreting predecessor statute), and *see* OR2002-2474 citing that decision. Since ORD 413 (1984), the Attorney General has agreed that information about the

minutia of prison operations that would compromise prison security is excepted from disclosure. The TDCJ believes that details about the procedural application of security policies in prison situations must be excepted from disclosure when the information might compromise the interests those security policies were created to protect.

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 section 552.108 of the Government Code, applied to except the release of information about the deployment of law enforcement officers, TDCJ security personnel, and barricades for a scheduled execution.

Due to the confidential nature, additional comments pertaining to the foregoing exception are set out in the confidential portion of our brief, as provided by section 552.301(e-1) of the Government Code. *See Attachment A.*

**V. SECTION 552.1081. EXCEPTION: CONFIDENTIALITY OF CERTAIN INFORMATION
REGARDING EXECUTION OF CONVICT**

Section 552.1081 of the Government Code provides in relevant part:

Information is excepted from the requirements of Section 552.021 if it contains identifying information under Article 43.14, Code of Criminal Procedure, including that of:

- (1) any person who participates in an execution procedure, including a person who uses, supplies, or administers a substance during the execution; and

The submitted information provides specific identifying information of TDCJ employees who participate in the execution process that is confidential under section 552.1081 and therefore must be withheld.

VI. SECTION 552.111. EXCEPTION: AGENCY MEMORANDA

Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency ...

Section 552.111 incorporates the deliberative process privilege into the PIA for intra-agency and interagency communications. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). The deliberative process privilege protects from disclosure intra-agency and interagency communications consisting of advice, opinion, or recommendations on policymaking matters of the governmental body at issue. The purpose of withholding advice, opinion, or recommendations under section 552.111 is to "encourage frank and open discussion within the agency in connection with its decision-making processes" pertaining to policy matters. *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App. – San Antonio 1982, writ red'd n.r.e.). An agency's policymaking functions do not encompass routine internal administrative and personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues." An agency's policymaking functions do include, however, administrative and personnel matters of broad scope that affect the governmental body's policy mission.

Due to the confidential nature, additional comments pertaining to the foregoing exception are set out in the confidential portion of our brief, as provided by section 552.301(e-1) of the Government Code. *See Attachment A.*

VII. SECTION 552.136. EXCEPTION: CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS

Section 552.136 of the Government Code provides in relevant part:

(b) Notwithstanding 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.

The submitted information provides inmate trust fund account information that is confidential under section 552.136 and therefore must be withheld.

VIII. SECTION 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES

Section 552.137 of the Government Code provides in relevant part:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

Section 552.137 generally states that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.” However, certain exceptions apply, including those articulated in Open Records Decision 684 in 2009. “Section 552.137(a) is not applicable to an institutional e-mail address, an internet website address, or an e-mail address a governmental body provides for the use of its officials or employees.” Open Records Decision No. 684 at 10 (2009).

The submitted information contains e-mail addresses of reporters for prominent, nongovernmental media organizations who used the e-mail addresses “for the purpose of communicating...with a governmental body” and are not governmental employees. Though the e-mail addresses are available publicly on that organization’s websites, reporters are considered “members of the public,” which is generally defined as “anyone who is not part of the agency or governmental body that is referenced.” *Austin Bulldog v. Leffingwell*, 490 S.W.3d 240, 249 (Tex. App.—Austin 2016, no pet.). The TDCJ’s inclination is that the reporters’ e-mail addresses are not an “institutional e-mail address,” thus making them confidential which your office confirmed in OR2019-08202 by ruling the e-mail address of a reporter must be withheld under section 552.137. Therefore, the e-mail addresses should be withheld under section 552.137 of the Government Code.

IX. SECTION 552.152. EXCEPTION: CONFIDENTIALITY OF INFORMATION CONCERNING PUBLIC EMPLOYEE OR OFFICER PERSONAL SAFETY

Section 552.152 of the Government Code provides as follows:

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.

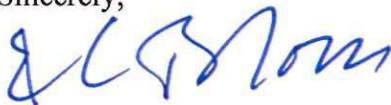
Section 552.152 excepts from disclosure information "that relates to an employee or officer of the governmental body" if "disclosure of the information would subject the employee or officer to a substantial threat of physical harm." The submitted information provides specific identifying information pertaining to TDCJ employees involved in some aspect of the execution process; therefore, there is no dispute the submitted information falls within the type of information that may be protected by section 552.152. The only question would be is whether the "disclosure of the information would subject" the employees "to a substantial threat of physical harm" which the TDCJ believes it does.

Due to the confidential nature, additional comments pertaining to the foregoing exception are set out in the confidential portion of our brief, as provided by section 552.301(e-1) of the Government Code. *See Attachment A.*

X. CONCLUSION

For the foregoing reasons, in conjunction with the additional comments provided in the confidential portion of our brief, the TDCJ requests your office to rule that the submitted information is confidential under the PIA and not subject to release.

Sincerely,



Erik Brown
Director of Legal Affairs

cc: Savannah Kumar
ACLU Foundation of Texas
P.O. Box 8306
Houston, TX 77288

ECB/AML
Attachment

(Note for Administrative Purposes Only: General Brief placed in FedEx on 06/23/21 and assigned Tracking# 774043645565)

The TDCJ requests that you send your ruling to:

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