



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 25, 2004

Mr. Scott A. Kelly
Deputy General Counsel
The Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2004-7284

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 206988.

The Texas A&M University System (the "system") received a request for information relating to variable air volume laboratory airflow control systems installed in facilities administered by the system over the past five years, including communications with architects, engineers, contractors, and vendors; preliminary project manuals; documentation relating to bidding and negotiation; and information pertaining to the evaluation and selection of particular laboratory airflow control systems. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the representative sample information you submitted.¹ We also have considered the comments that we received from the requestor.²

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the system to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), 302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

²See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Initially, we address the system's obligations under section 552.301 of the Government Code. This section prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See Gov't Code § 552.301(b)*. You inform us that the system received the present request for information on May 25, 2004. You first claimed an exception to disclosure under section 552.103 of the Government Code on July 2, 2004. Thus, you did not raise section 552.103 within the ten-business-day period prescribed by section 552.301(b). Section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Gov't Code § 552.007; Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (Gov't Code § 552.103 may be waived); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 subject to waiver). A claim under section 552.103 does not provide a compelling reason for non-disclosure under section 552.302 of the Government Code. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). In failing to comply with section 552.301, the system has waived section 552.103. *See* Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Therefore, the system may not withhold any of the requested information under section 552.103.

Next, we address your claim under section 552.101 of the Government Code. This section excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with sections 418.178 and 418.181 of the Government Code. Through the passage of House Bill 9, the Seventy-eighth Legislature added sections 418.176 through 418.182 to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. Section 418.178 provides as follows:

(a) In this section, "explosive weapon" has the meaning assigned by Section 46.01, Penal Code.

(b) Information is confidential if it is information collected, assembled, or maintained by or for a governmental entity and:

(1) is more than likely to assist in the construction or assembly of an explosive weapon or a chemical, biological, radiological, or nuclear weapon of mass destruction; or

(2) indicates the specific location of:

(A) a chemical, biological agent, toxin, or radioactive material that is more than likely to be used in the construction or assembly of such a weapon; or

(B) unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins.

Gov't Code § 418.178. Section 418.181 provides that

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

Id. § 418.181. The fact that information may relate to biological toxins or a governmental body's security measures does not make the information *per se* confidential under either of these sections. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a claim under one of the confidentiality provisions enacted by House Bill 9 must be accompanied by an adequate explanation of how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

In this instance, the request is for information relating to variable air volume laboratory airflow control systems ("VAV LAFCS") installed on any campus or other part of the system. Although you seek to withhold the requested information under section 418.181 of the Government Code, you have not demonstrated that VAV or LAFCS equipment qualifies as critical infrastructure for purposes of section 418.181. *See* Gov't Code § 421.001 (defining "critical infrastructure" to "include[] all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation"). Likewise, you have not demonstrated that the requested information reveals the vulnerability of any critical infrastructure to an act of terrorism. *See id.* §§ 418.181, 421.001. Thus, you have not established that any of the information at issue comes within the scope of section 418.181.

Although you also invoke section 418.178, you have not explained how or why the requested information could be used to build or assemble a weapon of any kind. *See id.* § 418.178(b)(1). Furthermore, you have not shown that the requested information indicates the location of any material that could be used to build or assemble such a weapon. *See id.* § 418.178(b)(2)(A). Likewise, you have not shown that the requested information relates to the whereabouts of any information relating to a potential vaccine or to a device that detects biological agents or toxins. *See id.* § 418.178(b)(2)(B). Consequently, you also have failed to bring any of the requested information within the scope of section 418.178. Because you

have not established that any of the information at issue is encompassed by sections 418.181 or 418.178 of the Government Code, the system may not withhold any of the requested information under section 552.101 of the Government Code in conjunction with these provisions. As you claim no other exception to disclosure, the requested information must be released in its entirety.

We note, however, that some of the information appears to be protected by copyright law. A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with the copyright law, however, and is not required to furnish copies of materials that are copyrighted. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990). Thus, the system must release any information that is protected by copyright in accordance with copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

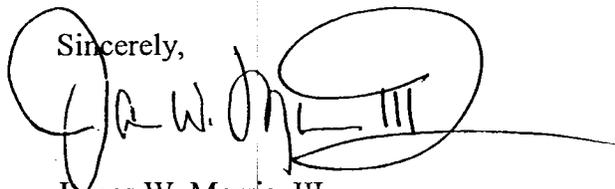
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", enclosed within a large, hand-drawn oval. A long horizontal line extends from the right side of the signature.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 206988

Enc: Submitted documents

c: Mr. Swiki A. Anderson
Accu Aire Controls, Inc.
1516 Shiloh Avenue
Bryan, Texas 77803
(w/o enclosures)