



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 25, 2005

Mr. Kevin McCalla
Director, General Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2005-03522

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 221629.

The Texas Commission on Environmental Quality (the "commission") received three requests for information regarding Homeland Security Services Solicitation #582-5-72612, the Bio-Watch program. You state that the commission has released some of the requested information, but claim that the remaining information is excepted from disclosure under section 552.101 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted representative sample of the information requested.² We have also received and considered comments from the United States Environmental Protection Agency

¹We note that some of the submitted information is not responsive to the instant request because it was created after the date the request was received. This ruling only addresses information responsive to the request at hand. *See generally* Gov't Code §§ 552.002, .021, .227, .351.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(the “EPA”). *See* Gov’t Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. You assert that the remaining information is confidential under section 418.178 of the Government Code. As part of the Texas Homeland Security Act, section 418.178 was added to chapter 418 of the Government Code. Section 418.178 provides:

(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. The fact that information may generally relate to biological toxins does not make the information *per se* confidential under section 418.178. *See generally* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). As with any confidentiality statute, a governmental body asserting section 418.178 must adequately explain how the responsive records fall within the scope of that provision. *See generally* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). You state that the Bio-Watch program “is a network of environmental sensors designed to detect biological weapons attacks against the major cities in the United States.” You assert that the “scope or nature of [the Bio-Watch program]” is within the protection of section 418.178 because it “contains a large body of sensitive information including the numbers and names of cities to be monitored and thus protected, the agents to be detected or monitored, the limits on the monitoring, persons involved, and equipment or protocols to be used.” Further, the commission represents that the Bio-Watch program “is considered a vital part of Homeland Security.” The EPA has also

submitted comments in support of the commission's assertion concerning the sensitivity of the requested information concerning the Bio-Watch program. Therefore, after reviewing your arguments and the arguments presented to us by the EPA, we conclude that information concerning the nature or scope of the Bio-Watch program must be withheld. We have marked the information that must be withheld under section 418.178 of the Government Code.

We now address your arguments under section 161.0213 of the Health and Safety Code for the remainder of the submitted information. Section 161.0213 provides as follows:

Reports, records, and information furnished to the commissioner [of public health] or the commissioner's designee or the Texas Natural Resource Conservation Commission that relate to an epidemiologic or toxicologic investigation of human illnesses or conditions and of environmental exposures that are harmful or believed to be harmful to the public health are not public information under Chapter 552, Government Code, and are subject to the same confidentiality requirements as described by Section 81.046.

You state that this section "clearly covers matters encompassed by the Bio-Watch program, including the entire range of solicitation documents." However, we do not find that this provision applies to the information at issue as it does not pertain to a specific epidemiologic or toxicologic investigation of human illnesses or conditions and of environmental exposures. Consequently, the commission may not withhold any of the remaining submitted information on this basis.

Finally, we address your assertion that the submitted information is protected under executive order. National Security Decision Directive (NSDD) Number 298 addresses the disclosure of information related to the Bio-Watch program. Under the guidance of NSDD 298, the EPA has provided a list of the types of sensitive information that should not be released concerning the Bio-Watch program. This list includes the number of cities actually protected, the names of cities actually protected, the agents to be detected, the size of attacks that can be detected, the names of individuals involved in the deployment, the names of cities not protected, anything that provides information about areas not monitored by Bio-Watch, the nature of attacks that cannot be detected, and the specific equipment or protocols used. Since none of the remaining submitted information falls within the list of sensitive information provided under NSDD 298, we need not determine whether a National Security Directive makes information confidential under the Act. *See, e.g.*, Attorney General Opinion MW-95 (1979) (concluding that neither Freedom of Information Act nor the federal Privacy Act of 1974 applies to records held by state or local governmental bodies in Texas); Open Records Decision No. 124 (1976) (concluding fact that information held by federal agency is excepted by Freedom of Information Act does not necessarily mean that same information is excepted under the Public Information Act when held by Texas governmental body).

In summary, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code. The remaining information must be released.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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 cursive script that reads "Amanda Crawford".

Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/sdk

Ref: ID# 221629

Enc. Submitted documents

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