



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 12, 2013

Mr. R. Brooks Moore
Managing Counsel, Governance
Office of General Counsel
The Texas A&M University System
301 Tarrow Street, 6th Floor
College Station, Texas 77840-7896

OR2013-11931

Dear Mr. Moore:

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# 491580 (AR 13-004, 13-005, 13-007, 13-008, 13-009, 13-010, 13-011, 13-012, 13-013, 13-014, 13-015, 13-016, 13-017, 13-019, 13-020, 13-021, 13-022, 13-023, 13-026, 13-027, and 13-028).

The Texas A&M University System and Texas AgriLife Research (collectively the "system") received 21 requests from different requestors for certain information pertaining to fertilizer plants and specified chemicals.¹ You state some of the responsive information has been released to the requestors. You state the system does not have information responsive to a portion of one of the requests.² You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the

¹We note the system received clarification of one of the requests for information. *See* Gov't Code § 552.222(b).

²We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

exception you claim and reviewed the submitted representative sample of information.³ We have also received and considered comments from one of the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we must address the system's obligations under the Act. Section 552.301 of the Government Code describes the obligations placed on a governmental body that receives a written request for information it wishes to withhold. *Id.* § 552.301. Section 552.301(e-1) of the Government Code requires a governmental body that submits written comments to the attorney general under section 552.301(e)(1)(A) to send a copy of those comments to the person who requested the information from the governmental body within fifteen business-days of receiving the request for information. *Id.* § 552.301(e-1). Section 552.301(e-1) authorizes a governmental body to redact information from those written comments that discloses or contains the substance of the information requested. *Id.* In this instance, the system sent the requestors a copy of its brief to this office requesting a decision and stating the exception that applies, but the brief does not contain any written comments stating the reasons why the asserted exception applies. We note the excluded portions of the system's comments contain information well beyond the substance of the submitted information. Therefore, we conclude the system failed to comply with the procedural requirements of section 552.301(e-1) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because section 552.101 can provide a compelling reason for non-disclosure, we will consider the applicability of this exception to the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You contend some of the submitted information is confidential under

³We assume 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 those records contain substantially different types of information than those submitted to this office.

section 552.101 in conjunction with section 418.178 of the Government Code. Section 418.178 was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act and 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. The fact that information may generally relate to biological toxins does not make the information *per se* confidential under section 418.178. *See* 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* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

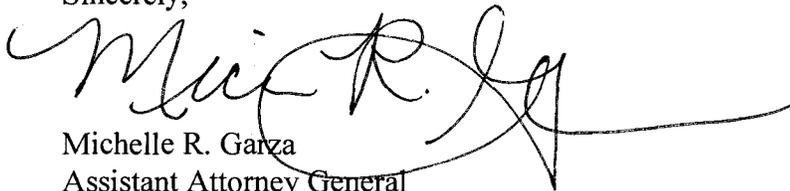
The system asserts section 418.178 is applicable to portions of the submitted information. You contend the information you have marked reveals the location of a chemical that is more than likely to assist in the construction or assembly of an explosive weapon and thus is protected by section 418.178(b)(2)(A). We agree some of the information at issue, which we have marked, is confidential under section 418.178 of the Government Code. Therefore, the system must withhold the information we have marked under section 552.101 in conjunction with section 418.178 of the Government Code. We note section 418.178(b)(2)(A) is applicable only to information indicating the specific location of certain materials that are more than likely to assist in the construction or assembly of such a weapon. The remaining information you seek to withhold does not indicate the specific locations of chemicals that are more than likely to assist in the construction or assembly of an explosive weapon. Accordingly, because the system has not explained how

section 418.178 encompasses any of the remaining information at issue, the system may not withhold any of the remaining information under section 552.101 of the Government Code on that basis. As you raise no other exceptions to disclosure for the remaining information, it must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle R. Garza", with a long horizontal flourish extending to the right.

Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 491580

Enc. Submitted documents

c: 17 Requestors
(w/o enclosures)