



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 16, 2005

Mr. Gene Snelson
General Counsel
Texas Animal Health Commission
P. O. Box 12966
Austin, Texas 78711-2966

OR2005-08472

Dear Mr. Snelson:

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# 232342.

The Texas Animal Health Commission (the "commission") received requests from four individuals for certain information pertaining to the cow that tested positive last June for Bovine Spongiform Encephalopathy ("BSE"), including information related to Texas slaughterhouses and rendering facilities, other requests for public information received by the commission, the name or names of the infected cow's previous owner or owners, a copy of the "hold order" issued by the commission, and the commission's correspondence with Champion Pet Foods of Waco and the United States Department of Agriculture (the "USDA"). You state that some of the requested information will be made available to the requestors but claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.110, 552.111, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the USDA, an attorney representing one of the requestors, an attorney representing the Texas Farm Bureau (the "bureau"), and an individual member of the bureau. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

As a preliminary matter, we note that the documents submitted as Exhibit D, under tabs 6A and 6B, consist of information from the USDA's publicly accessible Internet website. Because this information has already been made generally available to the public, it may not now be withheld. *See* Gov't Code § 552.007.

Next, we address the commission's and the USDA's assertion that some of the remaining information at issue is confidential under federal law. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This office has repeatedly held that the transfer of confidential information between governmental agencies does not destroy the confidentiality of that information. Attorney General Opinions H-917 (1976), H-836 (1974); Open Records Decision Nos. 561 (1990), 414 (1984), 388 (1983), 272 (1981), 183 (1978). These opinions recognize the need to maintain an unrestricted flow of information between state agencies. In Open Records Decision No. 561, on which the commission and the USDA rely, we considered whether the same rule applied regarding information deemed confidential by a federal agency. In that decision, we noted the general rule that the federal Freedom of Information Act ("FOIA") applies only to federal agencies and does not apply to records held by state agencies. ORD 561 at 6. Further, we stated that information is not confidential when in the hands of a Texas agency simply because the same information is confidential in the hands of a federal agency. *Id.* However, in the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, we concluded that "when information in the possession of a federal agency is 'deemed confidential' by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, [section 552.101] requires a local government to respect the confidentiality imposed on the information by federal law." *Id.* at 7.

In this instance, some of the information at issue was provided to the commission by the USDA. The USDA has advised this office that FOIA protects from disclosure the USDA's internal memoranda and e-mail correspondence, as well as certain identifying information in its situation reports, epidemiologist reports, surveillance data collection forms, and specimen submission forms.¹ Therefore, this information, which we have marked, must be withheld under section 552.101 of the Government Code on the basis of Open Records Decision No. 561.

¹The USDA also states that other documents—such as BIO RAD TSE Screening Reports, Texas Veterinary Medical Diagnostic Laboratory System Proof Reports, NVSL Reports, charts, diagrams, and maps or other illustrations—are also protected under FOIA. Because we are unable to identify any such documents within the information the commission submitted for our review, we do not address any such information in this ruling. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting a decision from Attorney General must submit a copy of the specific information requested or representative sample thereof).

However, the documents submitted as Exhibit D under tabs 1 and 8, as well as seven of the epidemiologist reports submitted under tab 3, appear on their face to be records of the commission, not the USDA. You inform us that this information is utilized by both the commission and the USDA. However, as discussed above, information is not confidential under the Act simply because the same information would be protected from disclosure in the hands of a federal agency. *See* ORD 561 at 6. Neither the commission nor the USDA otherwise explain how this remaining information might constitute records of the USDA that were shared with the commission. We therefore conclude that these remaining documents are not confidential records of a federal agency transferred to the commission, but rather are the records of the commission. Thus, the commission may not withhold this remaining information based on our reasoning in Open Records Decision No. 561.

Of this remaining information, you argue that the epidemiologist reports are excepted from disclosure under section 552.111 of the Government Code. However, we note that these epidemiologist reports are subject to section 552.022 of the Government Code. Specifically, section 552.022(a)(1) provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108 [of the Government Code.]

Gov't Code § 552.022(a)(1). The seven remaining epidemiologist reports constitute completed reports made of, for, or by the commission. Completed reports must be released under section 552.022(a)(1) unless excepted from disclosure under section 552.108 or expressly confidential under other law. Section 552.111 of the Government Code is a discretionary exception that may be waived and, as such, does not constitute other law that makes information confidential for purposes of section 552.022(a)(1). *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). As such, the commission's epidemiologist reports may not be withheld under section 552.111. However, you also raise sections 552.101, 552.102, 552.110, 552.117, and 552.137 of the Government Code. These exceptions are considered other law for purposes of section 552.022(a)(1). As such, we will address these exceptions' applicability to the remaining submitted information, including their potential applicability to the commission's epidemiologist reports.

Next, you raise section 552.101 in conjunction with certain provisions of the Texas Homeland Security Act. Specifically, you claim that, of the remaining submitted

information, the incident action plans and epidemiologist reports are subject to sections 418.176, 418.177, 418.180, and 418.181 of the Government Code.

In relevant part, section 418.176 provides:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency;

(2) relates to a tactical plan of the provider; or

(3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Section 418.177 provides:

Information is confidential if the information:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Section 418.180 provides:

Information, other than financial information, in the possession of a governmental entity is confidential if the information:

(1) is part of a report to an agency of the United States;

(2) relates to an act of terrorism or related criminal activity;
and

(3) is specifically required to be kept confidential:

(A) under Section 552.101 because of a federal statute or regulation;

(B) to participate in a state-federal information sharing agreement; or

(C) to obtain federal funding.

Section 418.181 provides:

Those 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.

Gov't Code §§ 418.176(a), .177, .180, .181. The fact that information may relate to a governmental body's security concerns or emergency management activities does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain 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).

You argue that disclosure of the information at issue would reveal the "structure and overall actions" used by the commission in response to this case of a BSE positive animal. You also explain that the commission's "structure and overall response would be the same for an intentional introduction of a foreign animal disease (i.e. terroristic event or criminal activity)[.]" Upon review of the remaining submitted information for which you claim these provisions, we find you have demonstrated that the incident action plans submitted under tab 1 are maintained for the purpose of responding to an act of terrorism as it relates to an emergency response provider's staffing requirements or tactical plan. *See* Gov't Code § 418.176. As such, the commission must withhold this information pursuant to section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.

However, we find that you have not demonstrated that the epidemiologist reports are maintained for the purpose of responding to an act of terrorism as it relates to an emergency response provider's staffing requirements or tactical plan. *See* Gov't Code § 418.176. Moreover, we find that this information neither constitutes nor reveals the contents of a vulnerability assessment. *See* Gov't Code § 418.177. Also, you have not established that the epidemiologist reports are "specifically required to be kept confidential" for purposes of section 418.180 or that they identify "the technical details of particular vulnerabilities of critical infrastructure" for purposes of section 418.181. *See* Gov't Code §§ 418.180, .181. As such, we conclude that none of the remaining information at issue may be withheld under section 552.101 of the Government Code on the basis of section 418.176, 418.177, 418.180, or 418.181.

Next, you claim that the owner's identifying information is protected under section 552.110 of the Government Code. However, section 552.110 is an exception that protects only the interests of third parties, as distinguished from exceptions that are intended to protect the interests of governmental bodies. *See* Open Records Decision No. 319 (1982) (statutory predecessor to section 552.110 designed to protect third-party interests that have been recognized by the courts). The commission is a governmental body responding to an open records request, not a private entity asserting third-party interests in the requested information. As such, the commission may not avail itself of section 552.110's protections. However, the bureau has also submitted arguments on behalf of its members, claiming that section 552.110 is applicable to the owner's identifying information.² Because the bureau is a third party claiming an interest in this information on behalf of its members, we will address its arguments regarding this exception.

Specifically, the bureau claims that the owner's identifying information is subject to section 552.110(b) of the Government Code. This provision protects the proprietary interests of private parties by excepting from disclosure "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." *See* Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Here, the bureau explains that "[s]imilar to a merchant's inventory or a banker's deposits and portfolio of loans, a rancher's cattle is the core of his business. . . . Thus, information about the condition and status of a rancher's herd is commercial information for purposes of

²We note that the bureau also raises section 552.101 of the Government Code on the basis of Open Records Decision No. 561. However, we have already addressed this claim as raised by the commission and the USDA.

section 552.110(b).” We agree that, in this instance, the identifying information of the owner constitutes commercial information for purposes of section 552.110(b) in that it reveals not just the identity of a person or business entity, but rather reveals the condition and status of this particular owner’s cattle. *Cf., e.g.,* Open Records Decision Nos. 552 (1990); 437 (1986); 306 (1982); 255 (1980) (identifying information of customers in customer lists may be withheld under predecessor to section 552.110). We also find that the bureau has demonstrated that substantial competitive harm would result from release of the identifying information. Thus, we conclude that the owner’s identifying information (including the owner’s name, contact information, ear tag number, and other such identifying information) in the remaining submitted documents must be withheld under section 552.110(b) of the Government Code. We note that, in making the determination in this matter, the specific information at issue relates to a single past case of one cow testing positive for BSE. Other facts, scenarios, and evidence, such as facts involving many cases of BSE or a present or future outbreak, will be reviewed on a case-by-case basis. *See, e.g.,* Open Records Decision No. 514 (1988).

To summarize, the commission must: (1) withhold the USDA’s information that the USDA advises is protected under FOIA pursuant to section 552.101 of the Government Code on the basis of Open Records Decision No. 561; (2) withhold the incident action plans submitted as Exhibit D under tab 1 in accordance with section 552.101 in conjunction with section 418.176 of the Government Code; (3) withhold the information that identifies or tends to identify the owner of the infected cow pursuant to section 552.110(b) of the Government Code; and (4) release the remaining submitted information to the requestors. As we reach these conclusions, we need not address your remaining arguments against disclosure.

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); *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 Office of the Attorney General 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. 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,



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Assistant Attorney General
Open Records Division

RBR/sdk

Ref: ID# 232342

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