



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 11, 2009

Mr. Marc Allen Connelly
Deputy General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2009-06308

Dear Mr. Connelly:

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# 342578.

The Texas Department of State Health Services (the "department") received a request for information pertaining to the following categories: (1) food inspection contracts between the United States Food and Drug Administration (the "FDA") and the department; (2) audits of department state food safety inspections since the year 2000; (3) department contract inspections reports submitted to the FDA since the year 2000; (4) FDA "semi-annual evaluations" of department food inspection performance since the year 2000; (5) annual evaluations of agreements between the FDA and the department since the year 2000; and (6) department "state inspection reports" submitted to the FDA pursuant to the partnership agreements between the FDA and the department since the year 2000. You state the information responsive to category 1 has been or will be made available to the requestor. You also state that information responsive to categories 4, 5, and 6 does not exist.¹ You claim that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim. We have also received and considered comments from a representative of the requestor. See

¹We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor's representative has submitted information she asserts is a sample of the information he has requested. She claims the information she has submitted may be used as the basis for an open records ruling from this office. However, the department has not submitted this information for our review. Therefore, because such information was not submitted by the governmental body, this ruling does not address that information. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

You state that the United States Food and Drug Administration (the "FDA") contracts with the department to conduct inspections under the authority of federal law and that the inspections are conducted by department employees who are commissioned officers of the FDA. You inform this office that the inspection reports created by the department are then submitted to the FDA. You assert that the FDA has informed the department that the reports and any information obtained from the inspections are confidential pursuant to sections 301 and 331(j) of title 21 of the United States Code. Further, you state "the inspection report(s) and audit report(s) [at issue] were conducted by an investigator of [the department] and/or an investigator/auditor of [the] FDA as credentialed commissioned officers of the FDA, therefore, the audit and investigation report(s) are being withheld pursuant to" these federal confidentiality provisions. Sections 301 and 331(j) of title 21 of the United States Code provide that the Federal Food, Drug, and Cosmetic Act prohibits the disclosure of certain confidential information, such as trade secrets acquired in an official capacity. You also refer to section 20.85, title 21, of the Code of Federal Regulations, which states:

Any Food and Drug Administration record otherwise exempt from public disclosure may be disclosed to other Federal government departments and agencies, except that trade secrets and confidential commercial or financial information prohibited by 21 U.S.C. § 331(j), 21 U.S.C. § 360(j)(c), 42 U.S.C. § 263g(d) and 42 U.S.C. § 263i(e) may be released only as provided by those sections. Any disclosure under this section shall be pursuant to a written agreement that the record shall not be further disclosed by the other department or agency except with the written permission of the Food and Drug Administration.

21 C.F.R. § 20.85. You assert that these federal provisions also prohibit this office from reviewing any documents that may be responsive to this request. Because you have not provided this office the documents at issue for review, we are unable to make any determination regarding such documents.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 342578

Enc. Submitted documents

c: Requestor (2)
(w/o enclosures)