



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 12, 2009

Ms. Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR2009-06374

Dear Ms. Hibbs:

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# 342208 (TDA-PIR-09-262).

The Texas Department of Agriculture (the "department") received two requests for information pertaining to the organic certification of the Peanut Corporation of America (the "PCA") facilities in Plainview, Texas, and any disciplinary actions against a specific inspector. You state the department has released some of the requested information. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also assert that the submitted information may contain proprietary information subject to exception under the Act. Accordingly, you state the department notified the PCA of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(a), (b). Pursuant to section 552.301(e), the governmental body must, within fifteen business days of receiving the request, submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the

written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). You do not indicate, and the submitted documents do not reveal, the date on which the department received the second request for information. Thus, we are unable to determine the department mailed its request for a ruling pertaining to the second request within the ten business day deadline required by section 552.301(b). Further, as of the date of this letter, you have not submitted a copy of the second request to this office as required by section 552.301(e)(2). Thus, the department failed to comply with the procedural requirements mandated by section 552.301.

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 requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Gov't Code § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). 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). Section 552.101 of the Government Code can provide a compelling reason to overcome this presumption; therefore, we will consider the department's claim under this exception.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of this letter, we have not received comments from the PCA explaining why the submitted information should not be released. Therefore, we have no basis to conclude the PCA has a protected proprietary interest in the submitted information, and the department may not withhold it on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade-secret), 542 at 3.

We will now address the department's argument against disclosure. 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 section encompasses information protected by other statutes. You raise section 552.101 in conjunction with the National Organic Program (the "NOP"), section 205.501 of title 7 of the Code of Federal Regulations. Section 205.501 states in pertinent part:

(a) A private or governmental entity accredited as a certifying agent under [the NOP] must:

(10) Maintain strict confidentiality with respect to its clients under the applicable organic certification program and not disclose to third parties (with the exception of the [United States] Secretary [of Agriculture] or the applicable State organic program's governing State official or their authorized representatives) any business-related information concerning any client obtained while implementing the regulations in this part, except as provided for in § 205.504(b)(5)[.]

7 C.F.R. § 205.501(a)(10). Section 205.504 states, in relevant part:

A private or governmental entity seeking accreditation as a certifying agent must submit the following documents and information [to the United States Department of Agriculture] to demonstrate its expertise in organic production or handling techniques; its ability to fully comply with and implement the organic certification program . . .

...

(b) Administrative policies and procedures.

...

(5) A copy of the procedures to be used, including any fees to be assessed, for making the following information available to any member of the public upon request:

(i) Certification certificates issued during the current and 3 preceding calendar years;

(ii) A list of producers and handlers whose operations it has certified, including for each the name of the operation, type(s) of operation, products produced, and the effective date of the certification, during the current and 3 preceding calendar years;

(iii) The results of laboratory analyses for residues of pesticides and other prohibited substances conducted during the current and 3 preceding calendar years; and

(iv) Other business information as permitted in writing by the producer or handler[.]

Id. § 205.504(b)(5). You state the department is an accredited organic certifying agent under the NOP. You represent that the submitted information consists of business-related information pertaining to a client of the department that was obtained while implementing

the regulations of the NOP, and, therefore, this information is confidential pursuant to section 205.501(a)(1) of title 7 of the Code of Federal Regulations. You argue that “only the information listed in [section 205.504(b)(5) of title 7 of the Code of Federal Regulations] may be publicly disclosed and that all other information not included in that list falls within the scope of the NOP’s confidentially provisions and is prohibited from public release, including routine inspection documents, as well as any documents obtained, created or assembled in connection with any investigation.” In support of this argument, you rely on comments by the United States Department of Agriculture published in the March 13, 2000, Federal Register as part of the rule-making process for the NOP. The most relevant comment states:

(4) List of Confidential Records. One commenter requested a definitive list of the records that had to be kept confidential. We cannot create such a list because it is not possible to describe every record that would be characterized as a business-related record. Such records would include, however, organic production and handling plans, records that are related to trade secrets and commercial or financial information obtained from applicants for certification, *and records or information compiled for an investigation into alleged noncompliance with the Act and regulations.*

65 Fed. Reg. 13579 (2000) (emphasis added); *see also id.* 13576-77, 13583. In addition, you state the department has “recently confirmed with officials of the NOP that the routine inspection forms used during the referenced inspections and investigation are clearly within these confidentiality provisions[.]” You also state that none of the exceptions listed in section 205.504(b)(5) of title 7 of the Code of Federal Regulations apply in this instance. *See* 7 C.F.R. § 205.504(b)(5). Accordingly, the department must withhold most of the submitted information under section 552.101 of the Government Code in conjunction with section 205.501 of title 7 of the Code of Federal Regulations. However, we find that a portion of the submitted information, which consists of a “Notice of Willful Violation and Proposed Revocation” from the department addressed to PCA, and an accompanying e-mail, was created by the department as a result of the department's investigation of PCA. The department did not “obtain,” but created, this information and the department did so after the investigation was concluded. Therefore, we find you have failed to demonstrate that this information was obtained by the department while implementing the regulations of the NOP or compiled for an investigation into alleged non-compliance with the NOP. Accordingly, the “Notice of Willful Violation and Proposed Revocation” and its accompanying e-mail, which we have marked, may not be withheld under section 552.101 of the Government Code on the basis of section 205.501 of title 7 of the Code of Federal Regulations.

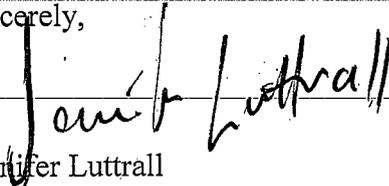
We note the marked e-mail contains an e-mail address subject to section 552.137 of the Government Code.¹ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not a type specifically excluded by section 552.137(c). Accordingly, the department must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its disclosure.

In summary, with the exception of the marked “Notice of Willful Violation and Proposed Revocation” and its accompanying e-mail, the department must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 205.501 of title 7 of the Code of Federal Regulations. Unless the owner of the marked e-mail address affirmatively consented to its disclosure, the department must withhold it under section 552.137 of the Government Code. The remaining information 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.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

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Ref: ID# 342208

Enc. Submitted documents

c: Requestor
(w/o enclosures)