



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 15, 2009

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

OR2009-06623

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# 341540.

The Texas Department of State Health Services (the "department") received two requests from the same requestor for information related to tests and inspection reports pertaining to the Peanut Corporation of America ("Peanut Corp.") plant in Plainview, Texas. You state the department will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.137 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of third parties. You state, and provide documentation showing, you notified the Peanut Corp. and Deibel Laboratories, Inc. ("Deibel") of the request and of their opportunity to submit comments 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 received comments from a representative of Deibel. We have also received comments from the Office of the Attorney General (the "OAG") and a representative of the requestor. *See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).* Deibel raises section 552.110 of the Government Code and the OAG raises section 552.103 of the Government Code.<sup>1</sup> We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup>We note that in its brief dated May 12, 2009, the OAG withdrew its assertion of section 552.101 of the Government Code.

An interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, Peanut Corp. has not submitted comments to this office explaining why any portion of the submitted information should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate Peanut Corp.'s proprietary interests. *See id.* § 552.110; Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Therefore, we determine the department may not withhold any portion of the submitted information on the basis of any proprietary interests that Peanut Corp. may have in the information.

We next note the submitted information includes documents that are subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) 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[.]

Gov't Code § 552.022(a)(1). The submitted information contains a completed report made by the department that is expressly public under section 552.022(a)(1). Although the department and the OAG claim the submitted information is excepted from disclosure under section 552.103 of the Government Code, we note this exception to disclosure is a discretionary exception under the Act that does not constitute "other law" for purposes of section 552.022.<sup>2</sup> Thus, the department may not withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code. As no other exceptions to disclosure are raised for the information subject to section 552.022, it must be released.

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<sup>2</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or which implicates the interests of third parties. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

Next, we address the department's and the OAG's claim under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 provides in relevant part as follows:

~~(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.~~

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

*Id.* § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines that it should be withheld pursuant to Gov't Code § 552.103 and that litigation is “reasonably likely to result”).

The department states the information at issue was gathered by the department as a result of an investigation of Peanut Corp. The department explains that on February 12, 2009, the department issued an Emergency Order and Recall Order against Peanut Corp. for violations of section 431.045 of the Health and Safety Code. *See* Health & Safety Code § 431.045. The OAG states that on February 13, 2009, the department formally referred this matter to the OAG's Consumer Protection and Public Health Division to pursue a case against Peanut Corp. in court. *See id.* §§ 431.0585(a), (h). The OAG states, and provides documentation

showing, that it issued a Civil Investigative Demand ("CID") under the Deceptive Trade Practice Act for the Peanut Corp.'s records on February 13, 2009. The OAG argues that it realistically contemplated bringing a civil action against Peanut Corp. on February 12, 2009, the date it was verbally notified by the department. The department states, however, it received the first request for information on February 11, 2009. Therefore, the department and the OAG have failed to establish that litigation was pending on the date the first request for information was received. Furthermore, the department and the OAG have failed to establish that they reasonably anticipated litigation on February 11, 2009. Therefore, no portion of the information at issue may be withheld under section 552.103 of the Government Code.

We next address Deibel's claim that the submitted test results may not be disclosed because they are confidential by designation or agreement. Information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987). Consequently, unless the submitted test results fall within an exception to disclosure, they must be released, notwithstanding any expectation or agreement to the contrary.

Deibel also raises section 552.110(b) of the Government Code for the submitted test results. Section 552.110(b) protects "[c]ommercial 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[.]" Gov't Code § 552.110(b). This exception to disclosure 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. *Id.* § 552.110(b); *see* ORD 661.

In this instance, Deibel generally asserts that its test results should be withheld under section 552.110(b) because the results contain references to Deibel's methodology of testing, temperature of samples, and amount of samples tested, and thus, this information is at the heart of how Deibel does its business. However, Deibel provides no specific factual or evidentiary showing that release of any particular portion of the test results would cause it substantial competitive harm under section 552.110(b). Thus, we find Deibel has failed to demonstrate the applicability of section 552.110(b) to the submitted test results and no portion of the submitted information may be withheld on this basis.

We next note section 552.130 of the Government Code is applicable to some of the submitted information.<sup>3</sup> Section 552.130 excepts from disclosure "information [that] relates

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<sup>3</sup>The 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).

to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state[.]” Gov't Code § 552.130. We note section 552.130 does not apply to out-of-state motor vehicle record information. Accordingly, the department must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code.

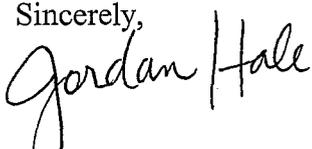
Finally, we address the department's claim under section 552.137 of the Government Code, which excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses the department has marked, as well as the additional e-mail address we have marked, are not of a type specifically excluded by section 552.137(c). You state the department has not received affirmative consent for release of the e-mail addresses at issue. Therefore, the department must withhold the marked e-mail addresses under section 552.137 of the Government Code.

In summary, the department must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code and the marked e-mail addresses under section 552.137 of the Government Code. As no other exceptions to disclosure are raised, the remaining submitted 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](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,



Jordan Hale  
Assistant Attorney General  
Open Records Division

JH/jb

Ref: ID# 341540

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

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