



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 5, 2009

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

OR2009-07749

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# 345141 (DSHS File No. O14780-N/A-2009).

The Texas Department of State Health Services (the "department") received a request for food inspection statistics and a list of companies the department investigated on behalf of the Food and Drug Administration (the "FDA").¹ You state you have released some of the requested information. You claim that the remaining requested information is excepted from disclosure under federal law. We have considered your arguments.

Initially, we must address the department's obligations under section 552.301 of the Government Code. Within fifteen business days of receiving a request for information, a governmental body that wishes to withhold information from public disclosure must submit to this office a copy of the written request for information. Gov't Code § 552.301(e)(1)(B). The department did not submit to this office a copy of the written request for information. Consequently, we find that the department failed to comply with the requirements of 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 id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990,

¹ As you have failed to submit a copy of the request for information, we take our description from your brief.

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. 319 (1982). This office has held that a compelling reason exists to withhold information when third party interests are at stake or when information is made confidential by another source of law. *See* Open Records Decision No. 150 (1977) (construing predecessor statute). However, your claim that the requested information is confidential under federal law provides a compelling reason to overcome the presumption of openness. Therefore, we will consider whether the department must withhold the requested information.

You state that 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 indicate the requested documents consists of information, compiled by department investigators as FDA commissioned officers, which is confidential under section 20.64 of title 21 of the Code of Federal Regulations. *See* 21 C.F.R. § 20.64 (stating certain records compiled for law enforcement purposes may be withheld from public disclosure). 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 20.88, title 21, of the Code of Federal Regulations, which states in relevant part

(c) Communications with State and local government officials who are not commissioned pursuant to 21 U.S.C. 372(a) or under a contract to perform law enforcement activities shall have the same status as communications with any member of the public, except that:

(1) Investigatory records compiled for law enforcement purposes by State and local government officials who perform counterpart functions to the Food and Drug Administration at the State and local level, and trade secrets and confidential commercial or financial information obtained by such officials, which are voluntarily disclosed to the Food and Drug Administration as part of cooperative law enforcement and regulatory efforts, shall be exempt from public disclosure to the same extent to which the records would be so exempt pursuant to §§ 20.61 and 20.64, as if they had been prepared by or submitted directly to Food and Drug Administration employees, except that investigatory records shall be exempt from disclosure for a longer period of time if the State or local government officials so require as a condition of their

furnishing the information to the Food and Drug Administration.

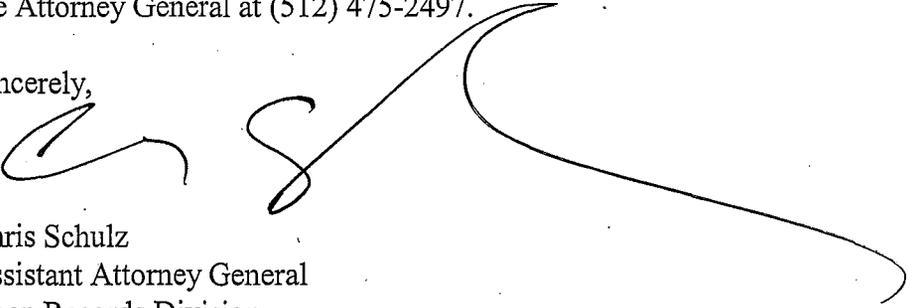
(2) Disclosure of investigatory records compiled for law enforcement purposes by the Food and Drug Administration to State and local government officials who perform counterpart functions to the Food and Drug Administration at the State and local level as part of cooperative law enforcement efforts does not invoke the rule established in § 20.21 that such records shall be made available for disclosure to all members of the public.

21 C.F.R. § 20.88(c). You assert that because this office is not commissioned by the FDA, section 20.88(c) prohibits you from disclosing the requested investigatory records to this office. Thus, because you have not provided this office with the documents at issue, 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,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/cc

Ref: ID# 345141

Enc. Submitted documents

cc: Requestor
(w/o enclosures)