



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 12, 2014

Ms. Audra Gonzalez Welter
Attorney and Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2014-16118

Dear Ms. Welter:

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# 536444 (OGC# 156788).

The University of Texas Medical Branch at Galveston (the "university") received a request for "[a]ll incoming and outgoing material transfer agreements for select agents, or parts thereof, including cDNAs and any material transfers in digital form, executed in 2014." You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.151 of the Government Code. You also state you have notified third parties of the request.¹ See Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor and one of the third parties. *Id.*

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial

¹The notified third parties are: Gifu University; Hennessy Research Associates, L.L.C.; The National Institute of Allergy and Infectious Diseases; SRC, Inc.; Public Health England; and the U.S. Army Medical Research Institute of Infectious Diseases.

decision.” *Id.* § 552.101. You and the third party contend portions of the information are confidential under section 552.101 in conjunction with section 418.178 of the Government Code. Section 418.178 was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act and provides as follows:

(a) In this section, “explosive weapon” has the meaning assigned by Section 46.01, Penal Code.

(b) Information is confidential if it is information collected, assembled, or maintained by or for a governmental entity and:

(1) is more than likely to assist in the construction or assembly of an explosive weapon or a chemical, biological, radiological, or nuclear weapon of mass destruction; or

(2) indicates the specific location of:

(A) a chemical, biological agent, toxin, or radioactive material that is more than likely to be used in the construction or assembly of such a weapon; or

(B) unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins.

Id. § 418.178. The fact that information may generally relate to biological toxins does not make the information *per se* confidential under section 418.178. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). As with any confidentiality statute, a governmental body asserting section 418.178 must adequately explain how the responsive records fall within the scope of that provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). You and the third party argue the information you have marked is confidential under section 418.178(b) because it reveals the location of biological agents and toxins that are more than likely to assist in the construction or assembly of a weapon of mass destruction. Upon review, we find the information you have marked is confidential under section 418.178 of the Government Code. Therefore, the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code.²

Section 552.151 of the Government Code provides the following:

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

(a) The following information that pertains to a biological agent or toxin identified or listed as a select agent under federal law, including under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Pub. L. No. 107-188) and regulations adopted under that Act, is excepted from the requirements of Section 552.021:

(1) the specific location of a select agent within an approved facility;

(2) personal identifying information of an individual whose name appears in documentation relating to the chain of custody of select agents, *including a materials transfer agreement*; and

(3) the identity of an individual authorized to possess, use, or access a select agent.

...

(c) This section does not except from disclosure the identity of an individual faculty member or employee whose name appears or will appear on published research.

(d) This section does not except from disclosure otherwise public information relating to contracts of a governmental body.

Id. § 552.151(a), (c), (d) (emphasis added). You state the biological agents and toxins at the locations at issue are identified as select agents under federal law. *See id.* § 552.151(a). You state the marked portions of the documents at issue reveal the specific location of select agents within an approved facility and the identity of individuals authorized to possess, use, or access a select agent. However, the requestor asserts the foreign entities at issue are not approved facilities within the meaning of section 552.151(a)(1) and people handling select agents outside the United States are not individuals “authorized to possess, use, or access a select agent” within the meaning of section 552.151(a)(3). The questions of whether the facilities at issue are approved facilities, and whether the individuals at issue are “authorized to possess, use, or access a select agent” are questions of fact. This office cannot resolve factual disputes in the opinion process. *See Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986).* Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See ORD 552 at 4.* Accordingly, we must accept the university’s representations that the facilities at issue are approved facilities and the individuals at issue are authorized to possess, use, or access a select agent. Thus, upon review, we find you have established

the information at issue reveals the specific location of a select agent within an approved facility and the identity of individuals authorized to possess, use, or access a select agent. The requestor also asserts the information at issue is "otherwise public information relating to contracts of a governmental body," and, therefore, must be released. *See* Gov't Code § 552.151(d). However, we note section 552.151 specifically encompasses certain information contained within material transfer agreements. *See id.* § 552.151(a)(2). Accordingly, we agree the university must withhold the information you have marked in the submitted material transfer agreements under section 552.151(a) of the Government Code.

In summary, the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code. The university must withhold the information you have marked under section 552.151(a) 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/dls

Ref: ID# 536444

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. David M. Linton
Senior Contracts Manager
SRC, Inc.
7502 Round Pond Road
North Syracuse, New York 13212
(w/o enclosures)

Sina Bavari, Ph.D.
Recipient Scientist
U.S. Army Medical Research
Institute of Infectious Diseases
(USAMRID)
1425 Porter Street
Fort Detrick, Md. 21702-5011
(w/o enclosures)

MV Rogers
Senior Business Development
Manager
Public Health England
Porton Down
Salisbury, SP4 0JG, UK
(w/o enclosures)

Makoto Sugiyama, DVM, Ph.D.
Laboratory of Zoonotic Diseases
Joint Department of Veterinary
Medicine
Gifu University
101 Yanagido
Gifu, 501-1193 Japan
(w/o enclosures)

Huda Suliman, Ph.D.
Recipient Scientist
SRC, Inc.
7502 Round Pond Road
North Syracuse, New York 13212
(w/o enclosures)

Erin P. Edgar
Colonel, Medical Corps, Commanding
U.S. Army Medical Research Institute of
Infectious Diseases (USAMRID)
1425 Porter Street
Fort Detrick, Maryland 21702-5011
(w/o enclosures)

Kristina J. Hennessy, DVM, Ph.D.
CEO/Owner
Hennessy Research Associates, LLC
12700 Johnson Drive
Shawnee, Kansas 66216
(w/o enclosures)

John J. McGowan, Ph.D.
Deputy Director for Science Management
The National Institute of Allergy and
Infectious Diseases
MSC 9804
5601 Fishers Lane, Suite 6D
Bethesda, Maryland 20892-9804
(w/o enclosures)