



December 6, 2001

Mr. George D. Cato
Deputy General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2001-5677

Dear Mr. Cato:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155770.

The Texas Department of Health (the “department”) received a request for copies of telephone calls and/or billing print-outs for a named individual using state-issued calling cards for December 2000 through July 2001. You inform us that most of the requested information will be released to the requestor, but claim that a certain unlisted telephone number is excepted from disclosure. You make no arguments for withholding this number, but have submitted a letter from the federal Food and Drug Administration (“FDA”) in which the FDA claims that the number is excepted pursuant to federal law. *See Gov’t Code § 552.304.* We have considered the FDA’s argument and reviewed the submitted information.

Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act’s] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general’s decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You acknowledge that you failed to request a decision within the ten business-day period mandated by section 552.301(a) of the Government Code. Because the request for a decision was not timely received, the requested information is presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that the requested information is public, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *see* Open Records Decision No. 630 (1994). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). The FDA informs us that it considers the unlisted phone number to be confidential under 5 U.S.C. § 552(b)(2) and 21 C.F.R. 20.62. These federal laws provide for confidentiality of certain information under the federal Freedom of Information Act. On this basis, we conclude that the phone number at issue is excepted from disclosure under section 552.101 of the Government Code, as the FDA in this case deems the phone number at issue to be confidential under federal law. *See generally* Open Records Decision No. 561 (1990) (when information in the possession of a federal agency is "deemed confidential" by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas). Therefore, the number you have highlighted in the submitted materials must be withheld from the requestor. The remaining information in the submitted materials must be released to the requestor. *See* Gov't Code § 552.022(a)(3) (information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by governmental body is public information and not excepted from required disclosure Public Information Act unless expressly confidential under other law).

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/sdk

Ref: ID# 155770

Enc: Submitted documents

c: Ms. Julee Magness
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(w/o enclosures)