



February 14, 2002

Mr. Monty Waters  
Assistant General Counsel  
Texas Department of Health  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR2002-0687

Dear Mr. Waters:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158636.

The Texas Department of Health (the “department”) received a request for the following information:

any notes, documents, memoranda, reports, surveys and/or work plans relating to any sampling and/or analysis of soil, groundwater, air or surface water in the vicinity of the ASARCO Incorporated (“Asarco”) El Paso, Texas Copper Smelter . . . [and] information maintained by [the department] or its employees relating to blood lead sampling and/or any other biomonitoring, conducted in the vicinity of the Asarco El Paso, Texas smelter.

Subsequently, the department received a second request for “all reports, findings or documents regarding . . . lead screening . . . of children living in the vicinity of the El Paso ASARCO Plant.” You state that some responsive information has been or will be released to the requestors. You claim that a portion of the requested information is excepted from disclosure under sections 81.046 and 161.0213 of the Health and Safety Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that you have submitted several documents for our consideration that did not exist at the time the department received the first request for information. The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). We have marked the documents that did not exist at the time of the first request and therefore need not be released to the first requestor.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by statute. You contend that the submitted information is excepted in its entirety under section 161.0213 of the Health and Safety Code. Section 161.0213 provides as follows:

Reports, records, and information furnished to the commissioner or the commissioner's designee or the Texas Natural Resource Conservation Commission that relate to an epidemiologic or toxicologic investigation of human illnesses or conditions and of environmental exposures that are harmful or believed to be harmful to the public health are not public information under Chapter 552, Government Code, and are subject to the same confidentiality requirements as described by Section 81.046.

Health & Safety Code § 161.0213. Section 161.0213 is found in Title 2 of the Health and Safety Code. Section 11 of that code contains the pertinent definitions of terms used in Title 2. Section 11.001(2) defines “Commissioner” to mean “the commissioner of public health” and section 11.001(3) defines “department” to mean the “Texas Department of Health.” Further, section 11.012(e) designates the commissioner as the executive head of the department.

The department explains that the submitted information pertains to a Health and Safety Code Chapter 161 investigation into cases or suspected cases or diseases or health conditions. *See* Health and Safety Code § 161.0211 (providing that department shall conduct epidemiologic or toxicologic investigations of human illnesses or conditions). You state that the submitted information was either furnished to the department or was created/gathered by the department. You also contend that the submitted information relates to an epidemiologic or toxicologic investigation of human illnesses and conditions, or environmental exposures that are harmful or believed to be harmful. Based on these representations and our review of the submitted information, we conclude that the department must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 161.0213 of the Health and Safety Code. Because we are able to make this determination, we need not address your remaining argument.

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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/seg

Ref: ID# 158636

Enc. Submitted documents

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