OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

April 3, 2002

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

OR2001-1649

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# 160708.

The Texas Department of Health (the "department") received a request for a listing of all chemical spills that occurred at the NASA Johnson Space Center from 1993 through 2001. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 161.0213 of the Health & Safety Code. However, you contend that release of the responsive information should be permissible under these particular circumstances pursuant to section 161.0211(b) of the Health & Safety Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that 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 state that the department received the request for information on December 20, 2001. You did not request a decision from this office until January 28, 2002. Consequently, 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 information, 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). You have raised section 552.101 of the Government Code as a compelling reason to overcome the presumption that the information is public. We conclude that the application of section 552.101 of the Government Code is a compelling reason to overcome the presumption of openness.

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 & 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 & 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.

You explain that the submitted information pertains to a Health & Safety Code Chapter 161 investigation into chemical release/spills at the Johnson Space Center. *See* Health & Safety Code § 161.0211 (providing that department shall conduct epidemiologic or toxicologic investigations of human illnesses or conditions). You also state that information pertaining to the spills is in the department's possession because it was furnished to the department by NASA personnel. Based on these representations and our review of the submitted information, we agree that the submitted information is confidential under section 552.101 of the Government Code in conjunction with section 161.0213 of the Health & Safety Code.

However, you claim that the submitted information may be released under section 161.0211(b) of the Health & Safety Code. Section 161.0211(b) provides as follows:

> (b) The department may conduct those investigations to determine the nature and extent of the disease or environmental exposure believed to be harmful to the public health. Any findings or determinations from such investigations that relate to environmental exposures believed to be harmful to the public shall be reported in writing to the Texas Natural Resource Conservation Commission and the two agencies shall coordinate corrective measures as appropriate. The department shall use generally accepted methods of epidemiology or toxicology in the conduct of an investigation.

You state that the statute "allows the department to take 'corrective measures as appropriate.'" You further contend that releasing this information to the entity that originally provided the information to the department will permit that entity to use the information in order to take corrective action. Based upon these representations, we conclude that if the department determines that release of this information is necessary for its corrective measures under the statute, the department may release the information for such purposes only. Therefore, the department may release the submitted information for corrective measures pursuant to section 161.0211(b) of the Health and Safety Code.

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

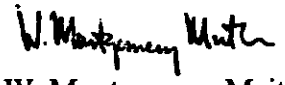
should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/sdk

Ref: ID# 160708

Enc: Submitted documents

c: Mr. David Hickens
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(w/o enclosures)