



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 24, 2009

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

OR2009-02412

Dear Mr. Connelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 335569.

The Texas Department of State Health Services (the "department") received a request for information pertaining to the investigations of four complaints against certain businesses and the investigations of the requestor's own facilities. The department released some information to the requestor and asserts information pertaining to the investigations of two complaints is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the department's claimed exceptions to disclosure and have reviewed the submitted information.

First, we address the department's failure to comply with section 552.301(b) of the Government Code, which requires a governmental body to state the exceptions that apply to withhold the information not later than the tenth business day after the date of receiving the written request. Gov't Code § 552.301(b). In addition, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested. *Id.* § 552.301(e). The department states it received the request for information on December 1, 2008. Thus, the deadline for asserting an exception to disclosure is December 15, 2008. However, the department did not assert section 552.103 until December 31, 2008.

Furthermore, the department did not submit the requested information until January 2, 2009. The department's delay in this matter results in the presumption that the requested information is public. *Id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ). 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. *Hancock*, 797 S.W.2d at 381. This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Section 552.103 is a discretionary exception that may be waived. Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (section 552.103 may be waived). Thus, the department may not withhold the submitted information under section 552.103. Because section 552.101 is a compelling reason to overcome the presumption of openness, we will consider its applicability to the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information that another statute makes confidential. The department contends the submitted information is confidential under section 17.61(f) of the Business and Commerce Code. Section 17.61 provides:

(a) Whenever the consumer protection division [of the office of the attorney general] believes that any person may be in possession, custody, or control of the original copy of any documentary material relevant to the subject matter of an investigation of a possible violation of this subchapter, an authorized agent of the division may execute in writing and serve on the person a civil investigative demand requiring the person to produce the documentary material and permit inspection and copying.

...

(f) No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the office of the attorney general without the consent of the person who produced the material. The office of the attorney general shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or any duly authorized representative of that person. . . .

Bus. & Com. Code § 17.61(f). This provision makes confidential all documentary material obtained pursuant to a civil investigative demand. The department informs this office that its attorney stated "there is the possibility of a civil litigation demand." However, the department does not state that a demand was in fact executed. Furthermore, section 17.61(a) authorizes the consumer protection division of the office of the attorney general or its authorized agent to execute such a demand, not the department. The department does not indicate it is the authorized agent of the consumer protection division of the office of the attorney general. Thus, the department may not withhold the submitted information under section 17.61(f).

Lastly, we address the department's assertion under federal law to withhold the inspection report of the May 2007 investigation of Tiller Mind and Body. The department explains the United States Food and Drug Administration (the "FDA") contracts with the department to conduct inspections under authority of federal law and the inspections are conducted by department employees who are commissioned officers of the FDA. According to the department, the inspection report it creates is then submitted to the FDA. The department states the FDA has informed the department the report and any information obtained from the inspection are confidential pursuant to sections 301 and 331(j) of title 21 of the United States Code. These provisions provide the Federal Food, Drug, and Cosmetic Act prohibits the disclosure of certain confidential information, such as trade secrets acquired in an official capacity. 21 U.S.C. §§ 301, 331(j). In addition, the department refers to section 20.85 of title 21 of the Code of Federal Regulations, which states:

Any Food and Drug Administration record otherwise exempt from public disclosure may be disclosed to other Federal government departments and agencies, except that trade secrets and confidential commercial or financial information prohibited from disclosure by 21 U.S.C. § 331(j), 21 U.S.C. § 360(j)(c), 42 U.S.C. § 263g(d) and 42 U.S.C. § 263i(e) may be released only as provided by those sections. Any disclosure under this section shall be pursuant to a written agreement that the record shall not be further disclosed by the other department or agency except with the written permission of the Food and Drug Administration.

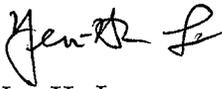
21 C.F.R. § 20.85. Finally, the department contends these federal provisions prohibit this office from reviewing the inspection report of the May 2007 investigation of Tiller Mind and Body. Because the department has not provided this office the report at issue for review, we are unable to make any determination regarding such a report.

In summary, the department must release the submitted reports concerning complaint numbers 115592 and 115593.

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](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,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/sdk

Ref: ID# 335569

Enc: Submitted documents

c: Requestor  
(w/o enclosures)