



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

This ruling has been modified by court action  
The ruling and judgment can be viewed in PDF  
format below.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 11, 2011

Ms. Lisa M. Nieman  
Assistant General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

OR2011-04966

Dear Ms. Nieman:

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# 414826 (ORR# 18527-2011).

The Texas Department of State Health Services (the "department") received a request for eleven specified categories of information pertaining to hens that produce shell eggs for human consumption, such as commercial production facilities and investigations conducted by the department. You state the department has released or will release some of the requested information. You also inform us the department will withhold the requested information that is subject to section 81.046 of the Health and Safety Code pursuant to the previous determination issued to the department, Open Records Letter No.2010-18849 (2010). *See* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e)(1)(D), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(D). You inform us the department received the request for information on January 27, 2011. Thus, the fifteen-day

deadline for the department to submit a copy of the specific information requested is February 17, 2011. However, the department hand delivered the submitted information to this office on February 18, 2011, as the department noted on the envelope containing the responsive information. Thus, the department failed to comply with the procedural requirements mandated by section 552.301(e)(1)(D). *See id.*

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Sections 552.103, 552.107, and 552.111 of the Government Code are all discretionary in nature; they serve only to protect a governmental body's interests. As such, the department's claims under these sections are not compelling reasons to overcome the presumption of openness. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 11-12 (2002) (claim of attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 does not provide compelling reason for purposes of section 552.302 if it does not implicate third-party rights), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, the department may not withhold the submitted information pursuant to these exceptions. Section 552.137 of the Government Code can, however, provide a compelling reason to overcome this presumption.<sup>1</sup> Therefore, we will address the applicability of this section to the submitted information.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov't Code* § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

address contained in the submitted materials. Therefore, the department must withhold the e-mail addresses we have marked under section 552.137.

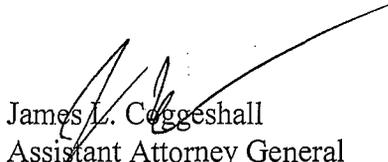
We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

To conclude, the department must withhold the information we have marked under section 552.137 of the Government Code. The department must release the remaining information to the requestor, but any copyrighted information may only be released in accordance with copyright law.

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, toll free, at (888) 672-6787.

Sincerely,



James L. Caggeshall  
Assistant Attorney General  
Open Records Division

JLC/bs

Ref: ID# 414826

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

AUG 01 2013 SG

At 1:54 P.M.  
Amelia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-11-001394

TEXAS DEPARTMENT OF STATE §  
HEALTH SERVICES, §  
Plaintiff, §  
v. §  
GREG ABBOTT, ATTORNEY GENERAL §  
OF TEXAS, §  
Defendant, §  
v. §  
ANIMAL LEGAL DEFENSE FUND, §  
Intervenor/Counter-Plaintiff §

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

353<sup>RD</sup> JUDICIAL DISTRICT COURT

**AGREED ORDER FOR DISMISSAL WITH PREJUDICE**

On this date, came to be heard in the above-styled and numbered cause, this *Agreed Order for Dismissal with Prejudice*. The Court, after reviewing the pleadings and evidence, FINDS that:

The parties have entered into a settlement agreement and wish to dismiss this suit with prejudice.

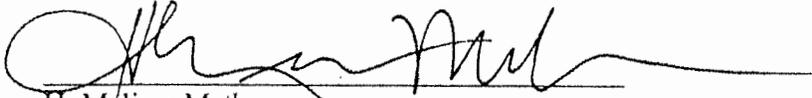
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED: that this lawsuit is hereby immediately DISMISSED with prejudice.

All further relief prayed for in the parties' last live pleadings, and not expressly granted herein, is DENIED.

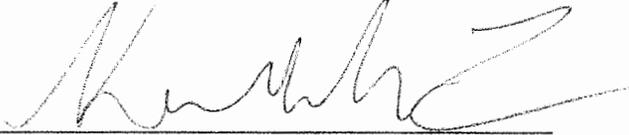
Signed this 1 day of August, 2013.

  
PRESIDING JUDGE

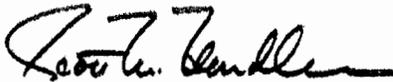
APPROVED AS TO FORM AND CONTENT:



H. Melissa Mather  
Assistant Attorney General  
State Bar No. 24010216  
Office of the Texas Attorney General  
*Attorney for Texas Department of State Services, Plaintiff*



Kimberly Fuchs  
Assistant Attorney General  
State Bar. No. 24044140  
Office of the Attorney General  
*Attorney for Greg Abbott, Attorney General of Texas, Defendant*



Scott M. Hendler  
State Bar No.09445500  
Attorney at Law  
*Attorney for Animal League Defense Fund, Intervenor/Cross-Plaintiff*



certain exceptions under the PIA, including an exception for attorney-client privileged communications.

3. While DSHS's request for a letter ruling was timely, the actual documents at issue were hand delivered to the Attorney General for his office's review one day after the statutory deadline had passed.

4. On April 11, 2011, the Attorney General issued a letter ruling finding that the documents DSHS had provided to the Attorney General were delivered after the statutory deadline had passed, and therefore the documents could be withheld only for a "compelling reason." The Attorney General's letter ruling found no compelling reason to withhold the documents, including those disclosing attorney-client communications, and ordered DSHS to deliver the documents to the requestor. The letter ruling did require DSHS to withhold certain email addresses and comply with copyright law in producing copyrighted materials.

5. On May 11, 2011, DSHS filed a complaint in Travis County District Court, contesting the validity of the Attorney General's ruling.

6. On March 22, 2012, ALDF intervened in the lawsuit, as permitted under the PIA. On June 28, 2012, ALDF moved for summary judgment, alleging that there was no dispute as to the fact that DSHS's delivery of the documents to the Attorney General was late, and, as a matter of law, the fact that some or all of the documents may fall under various privileges, including the attorney-client privilege, was not sufficient to constitute a compelling reason for the documents to be withheld.

7. On July 24, 2012, Judge Stephen Yelenosky issued an Order granting ALDF's motion for summary judgment, and ordering DSHS to produce the documents to ALDF within 15 days.

8. On August 8, 2012, the Court granted a joint motion to extend the time to produce the documents another 15 days, up to and including August 23, 2012.

9. The parties now enter into this Settlement Agreement for the purpose of avoiding protracted litigation over the issue of what privileges may or may not, as a matter of law, constitute compelling reasons for withholding under the PIA.

#### **Terms of Settlement**

For good and valuable consideration, the sufficiency of which is hereby acknowledged, DSHS, Attorney General Abbott and ALDF hereby agree as follows:

1. **Agreed production.** DSHS hereby agrees that it will produce, on or before August 24, 2012, all documents in its possession responsive to ALDF's open records request, dated January 27, 2011, with the exception of 5 emails that have been redacted from various email strings, in substantially the form reviewed by counsel for ALDF, under an agreed protective order, on August 20, 2012.
2. **Agreement to accept production in lieu of compliance with the August 2, 2012 Order.** In consideration for the execution of this Agreement and the delivery of the documents as described above, both ALDF and Attorney General Abbott agree that they will take no action to enforce the terms of the Order issued August 2, 2012, and they will accept the production described above as full compliance with the Court's Order. DSHS agrees that it will not appeal or otherwise challenge the August 2, 2012 Order.

3. **No waiver of privileges for documents not produced.** In consideration for the execution of this Agreement and the delivery of the documents set forth above, and without limiting the public nature of the documents disclosed pursuant to this Agreement, ALDF agrees that it will not use the production made pursuant to this agreement as a basis to argue that DSHS has waived any privilege that it might otherwise assert in litigation, for documents other than those produced pursuant to this Agreement.
4. **Mutual Release.** In exchange for and conditioned upon performance of the covenants expressed herein, each of the three parties to this Agreement releases and forever discharges each of the other parties to this Agreement from any and all claims, causes of action, liability and damages of any kind, known or unknown, whether in contract or tort, arising from the open records request at issue in this lawsuit. This release does not include or purport to affect any party's right to enforce this Agreement.
5. **No admission of liability.** All parties acknowledge, represent, and agree that this Agreement does not constitute and shall not be construed as an admission either of liability for or a lack of merit in any released claim. Execution of this Agreement shall not be construed as an admission that any party has violated any law, obligation or duty owed to another.
6. **Authority to enter this Agreement.** Having agreed to the terms herein, the undersigned signatories hereby represent that they have authority to enter into this Agreement.
7. **Multiple counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be considered an original.
8. This Agreement shall be governed and construed by the laws of the State of Texas.

9. Any future litigation arising out of this Agreement must be brought in a District Court of Travis County, Texas.

**IN WITNESS WHEREOF**, the parties execute this Agreement as of the date of the acknowledgement of such signatures below, to be effective as of the last date that a party has signed the Agreement.

PLAINTIFF, TEXAS DEPARTMENT OF STATE HEALTH SERVICES

By:  \_\_\_\_\_

Date: 8/22/12 \_\_\_\_\_

DEFENDANT, ATTORNEY GENERAL OF TEXAS,  
GREG ABBOTT

By:  \_\_\_\_\_

Date: 8/23/12 \_\_\_\_\_

INTERVENOR, ANIMAL LEGAL DEFENSE FUND

By: \_\_\_\_\_

Date: \_\_\_\_\_

9. Any future litigation arising out of this Agreement must be brought in a District Court of Travis County, Texas.

**IN WITNESS WHEREOF**, the parties execute this Agreement as of the date of the acknowledgement of such signatures below, to be effective as of the last date that a party has signed the Agreement.

PLAINTIFF, TEXAS DEPARTMENT OF STATE HEALTH SERVICES

By: \_\_\_\_\_

Date: \_\_\_\_\_

DEFENDANT, ATTORNEY GENERAL OF TEXAS,  
GREG ABBOTT

By: \_\_\_\_\_

Date: \_\_\_\_\_

INTERVENOR, ANIMAL LEGAL DEFENSE FUND

By:   
COURTNEY KENDALL  
COUNSEL OF RECORD

Date: 8/22/2012