ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 6, 2011

Ms. Melanie Barton
Assistant District Attorney
Dallas County
411 Elm Street, 5th Floor
Dallas, Texas 75202

OR2011-09549

Dear Ms. Barton:

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# 422729.

The Dallas County Health and Human Services Department (the "department") received a request for seven categories of information related to an investigation of Salmonella poisoning.[1] You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered arguments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released).

Initially, we note the requestor has excluded from his request the names of individuals other than his client. Accordingly, the names of individuals other than the requestor's client are not responsive to the request. This ruling does not address the public availability of information that is not responsive to the request, and the department need not release information that is not responsive.

Next, we must address the department's responsibilities under the Act. Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking

[1]As you have not submitted a copy of the request, we take our description from information submitted to our office by the requestor.

this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body that receives a request for information it wishes to withhold under an exception to disclosure is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) 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). The department received the request for information on April 21, 2011. Thus, the department was required to submit the information required by section 552.301(e) by May 12, 2011. As of the date of this letter, you have not submitted a copy of the written request for information. Consequently, we find the department failed to comply with the requirements of section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released, unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov't Code § 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) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). Normally, 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). Your claim under section 552.101 of the Government Code provides a compelling reason necessary to overcome the presumption that the submitted information is public. Accordingly, we will consider this exception.

Section 552.101 of the Government Code 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 section 81.046 of the Health and Safety Code, which provides:

> (a) Reports, records, and information received from any source, including from a federal agency or from another state, furnished to a public health district, a health authority, a local health department, or the [Texas Department of State Health Services] that relate to cases or suspected cases of diseases or health conditions are confidential and may be used only for the purposes of this chapter.
>
> (b) Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information under Chapter 552,

> Government Code, and may not be released or made public on subpoena or otherwise except as provided by Subsections (c), (d), and (f).

Health & Safety Code § 81.046(a), (b). In Open Records Decision No. 577 (1990), this office concluded that any information acquired or created during an investigation under chapter 81 is confidential and may not be released unless it is subject to an exception set out in the statute. You state the submitted information consists of records relating to an investigation by the department of a possible case of Salmonella poisoning. You further state the information was gathered or created by the department pursuant to the provisions of chapter 81. Accordingly, we find the confidentiality provisions of section 81.046 generally applicable to the submitted information. However, pursuant to subsection 81.046(c), the department may release medical or epidemiological information that is confidential under section 81.046 on the following grounds:

> (1) for statistical purposes if released in a manner that prevents the identification of any person;
>
> (2) with the consent of each person identified in the information[.]

Health & Safety Code § 81.046(c). In Open Records Decision No. 577, this office concluded section 81.046(c)(2) of the Health and Safety Code, when read together with the statutory predecessor to section 552.023 of the Government Code, requires a county health department to release to a requestor any medical or epidemiological information it has concerning an individual who has consented to the release.[2] ORD 577 at 3. Therefore, the department is required to release information that is otherwise confidential under section 81.046 if the individual to whom the records pertain consents to its release.

We note most of the submitted information relates to the requestor's client. The requestor asserts these records are subject to section 81.046(c)(2) and states that he has provided the department with a written consent that satisfies the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), found in 42 U.S.C. §§ 1320d–1320d-8. However, we note section 81.046(c) of the Health and Safety Code, not HIPAA, governs the release of this information. Therefore, if the department does not receive the proper consent for release of the requestor's client's information, the department must withhold the submitted information in its entirety pursuant to section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code. If the department does receive consent from the requestor's client under section 81.046(c), then the requestor has a right of access under that section to the medical or epidemiological information pertaining

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[2]*See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves).

to his client, and that information must be released pursuant to section 81.046(c)(2). *See* Health & Safety Code § 81.046(c)(2).

The requestor seeks the disclosure of information that does not relate to his client on the basis of section 81.046(c)(1). *Id.* § 81.046(c)(1). He states that he is seeking this information "to establish the statistical connection between [his client's] illness and that of a more expansive outbreak[.]" He argues that because he is seeking information solely pertaining to his client with no identifiable information regarding other individuals, the department should release the requested line list as statistical data pursuant to section 81.046(c)(1). However, the requestor does not provide any arguments explaining how release of this information to an attorney representing his client is "for statistical purposes." *See id.* § 81.046(c)(1). Thus, we find the requestor has not shown how the exception to confidentiality in section 81.046(c)(1) is applicable.

The requestor additionally seeks disclosure of the information pertaining to individuals other than the requestor's client on the grounds that these individuals' information may be released because the information has been de-identified. However, by its own terms section 81.046 only permits the release of an individual's information upon receipt of proper consent. Therefore, because these individuals have not provided consent, their information is confidential under section 81.046 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code.

Finally, the requestor asserts that, pursuant to *In re Perritt*, 973 S.W.2d 776 (Tex. App.—Texarkana 1998, orig. proceeding), the department may release the information at issue with confidential medical information redacted. The trial court in *Perritt* ordered disclosure of the names of participants in a Department of Health and the Center for Disease Control investigation of food poisoning conducted pursuant to section 81.046 "based on a perceived need in discovery, but ordered the defendants not to contact those disclosed individuals." *Perritt*, 973 S.W.2d at 779 n.3. However, release to the requestor in this instance would not be pursuant to discovery, nor is it otherwise authorized pursuant to section 81.046(c). Further, we note that *Perritt* specifically did not address whether the trial court had the authority to order release of the names of the participants in the study. *See id.* at 782 ("It is arguable that not even the names of the participants in the study should have been released because [section 81.046] clearly provides for absolute confidentiality"). Thus, we find that *Perritt* does not provide the requestor a right of access to the information at issue.

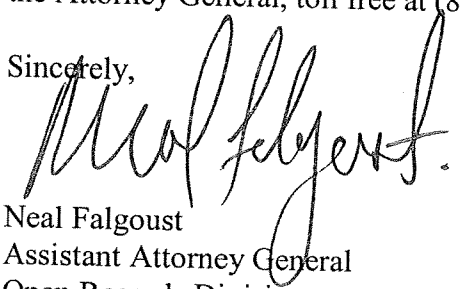
In summary, unless the department receives consent from the requestor's client under section 81.046(c), the department must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code. If the department receives consent from the requestor's client, then the department must release any medical or epidemiological information pertaining to his client

and withhold the remaining information under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code.

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, 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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/dls

Ref: ID# 422729

Enc. Submitted documents

c: Requestor
(w/o enclosures)