



April 5, 2002

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

OR2002-1684

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# 161289.

The Texas Department of Health (the "department") received a request for three categories of information related to the El Paso Soils Workgroup and metal contamination in El Paso soil. You claim that 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 have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

You state that a portion of the requested information was the subject of a previous ruling from this office. In Open Records Letter No. 2002-0687 (2002), we concluded that the department was required to withhold the submitted information under section 161.0213 of the Health and Safety Code. Therefore, as you represent that the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, the department must withhold the information previously submitted in accordance with Open Records Letter No. 2002-0687 (2002).¹ *See* Gov't Code § 552.301(f); Open Records Decision No. 673 (2001).

¹The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

We will next address your arguments regarding the information submitted as responsive to the instant request. We note that the department did not seek an open records decision from this office within the statutory ten-day period. *See* Gov't Code § 552.301. The department received the request for information on January 16, 2002. However, you did not request a decision from this office until February 8, 2002, more than ten business days after the date that you received the request. The department's delay in this matter results in the presumption that the requested information is public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). 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). Your claims that the information is excepted from disclosure pursuant to various confidentiality statutes provide such a compelling reason. *See, e.g.*, Open Records Decision No. 150 (1977) ("compelling reason" for withholding information is if information is made confidential by another source of law or affects third party interests).

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 other statutes. Section 81.046 of the Health and Safety Code provides, in pertinent part:

- (a) Reports, records, and information furnished to a health authority or the department 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 Subsection (c) and (d).

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 an exception set out in the statute applies. You state that the submitted information was either furnished to the department or was created/gathered by the department and relates to cases or suspected cases of disease or health conditions and may not be disclosed. After reviewing the submitted information, we agree that the information at issue falls within the scope of section 81.046. Further, none of the section's permissive release provisions appear to apply. As such, 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. Because this provision is dispositive, we do not address your other 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. 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,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is written in a cursive style with a long horizontal stroke at the end.

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 161289

Enc. Submitted documents

c: Ms. Teresa Montoya
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El Paso, Texas 79912
(w/o enclosures)