



August 27, 2002

Mr. Michael G. Young  
Assistant General Counsel  
Texas Department of Health  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR2002-4785

Dear Mr. Young:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167058.

The Texas Department of Health (the “department”) received a request for “the summary judgments rendered by [a named] Hearing Examiner for years 2000, and 2001,” and “the complete list . . . of store [sic] that had compliance buys in 2001 by region.” You state that the department does not issue summary judgments, but, in a good faith attempt to relate the request to information which the department holds, you have identified orders that you believe are responsive to that portion of the request. Open Records Decision Nos. 558 (1990), 561 (1990), 555 (1990). You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup> We have also considered comments submitted to this office by the requestor. Gov’t Code §552.304.

You acknowledge that the department failed to submit its request for a decision on or before the tenth business day following its receipt of the written request for information, as required by section 552.301(b) of the Government Code. This failure results in the presumption that the responsive information is public and must be released. Gov’t Code § 552.302. This presumption may be overcome by a demonstration that the information is made confidential

---

<sup>1</sup>We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

by other law, or that third party interests are at issue. Open Records Decision No. 150 (1977). Here, you assert that the responsive information is made confidential by federal regulation and must be withheld under section 552.101 of the Government Code. We will therefore address your arguments.

We note that the submitted documents include orders issued by the department. These decisions and the attachments incorporated therein, the Findings of Fact and Conclusions of Law, are made public by statute and ordinarily must be released to the requestor. Gov't Code § 2001.004 (state agency shall make available for public inspection all final orders, decisions, and opinions); *see also* Gov't Code § 552.022(a)(12) ("final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases" not excepted from public disclosure unless made confidential by law). However, in this case, federal provisions govern the public disclosure of vendor information. When there is a conflict with state law, the federal provisions govern. *See English v. General Elec. Co.*, 110 S.Ct. 2270, 2275 (1990) (state law preempted to extent it actually conflicts with federal law).

Section 552.101 of the Government Code 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, and has been found by this office to encompass information made confidential by federal regulations. *See Rainbow Group, Ltd. v. Texas Employment Comm'n*, 897 S.W.2d 946 (Tex.App.-Austin 1995, writ denied) (court approves office of attorney general finding to withhold, under section 552.101, unemployment compensation identification numbers as made confidential by federal regulations). The Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC") is regulated by title 7 of the Code of Federal Regulations.

Section 246.26(e) of this title provides for the confidentiality of certain information about a WIC program vendor:

Confidential vendor information is any information about a vendor (whether it is obtained from the vendor or another source) that individually identifies the vendor, except for vendor's name, address and authorization status. Except as otherwise permitted by this section, the State agency must restrict the use or disclosure of confidential vendor information to [specific entities].

7 C.F.R. § 246.26(e). The purpose for protecting vendor information by limiting its use and disclosure is two-fold: "to encourage vendors to provide the information necessary to authorize and monitor vendors and to avoid compromising state agency investigative techniques." 65 Fed. Reg. 83248, 83275 (2001), *see also* 64 Fed. Reg. 32308, 32333 (2001). This provision is generally designed to protect all information about WIC vendors, not just identifying information. However, vendors' names, addresses, and authorization statuses, on their own, are not protected under this provision. *See* 7 C.F.R. § 246.26(e). Moreover,

these limitations on use and disclosure are not applicable to aggregate data about WIC vendors and other data that do not individually identify a vendor. 65 Fed. Reg. 83248, 83276 (2001). Furthermore, section 246.26(e) provides for the release of confidential vendor information in certain circumstances. 7 C.F.R. § 246.26(e)(1)-(3).

You assert that the requested information individually identifies WIC vendors selected by the department for investigation and vendors found to have violated WIC laws. Based on your argument and our review of the submitted information, we find that the information at issue consists of information about vendors that individually identifies the vendors. We note that the submitted information contains the names and addresses of the vendors. However, we find that, where, as here, the request is for the complete list of stores in which compliance buys were conducted by the department and for judgments rendered by the department concerning WIC vendors, the release of the vendor names and addresses from the requested information necessarily reveals information about vendors beyond vendor names and addresses. We therefore conclude that all of the submitted information is subject to section 246.26(e). It is not apparent from the information you have provided that the release provisions of the regulation are applicable to this request. *See id.* If the department determines the requestor has a right of access to this information under section 246.26(e), the department may exercise its discretion and release the information at issue. Otherwise, the submitted information is made confidential by section 264.26(e) of title 7 of the Code of Federal Regulations and must be withheld under section 552.101 of the Government 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/sdk

Ref: ID# 167058

Enc. Submitted documents

c: Mr. Joe Williams  
Gulf Coast Retailers Association  
1300 Shepherd Drive  
Houston, Texas 77007-3455  
(w/o enclosures)