



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 11, 2003

Ms. Gail L. Allan
Administration and Northern Legal Services
Texas Water Development Board
P.O. Box 13231
Austin, Texas 78711-3231

OR2003-4023

Dear Ms. Allan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182668.

The Texas Water Development Board (the "board") received an original request for the water use surveys from 1998-2000 for all municipal water user groups Region F. The requestor subsequently amended the request by stating he prefers to receive the data in electronic format. The board asks whether the electronic data must be withheld under section 552.101 of the Government Code in conjunction with section 16.012(m) of the Water Code. We have considered the exception you claim and reviewed the submitted information.

Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

The board received the request on March 18, 2003. The board did not request a decision from this office until April 9, 2003. Consequently, the board failed to request a decision within the ten business day period mandated by section 552.301(a) of the Government Code.

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 (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. The board did not submit to this office these required items until April 9, 2003.

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. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). 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). The applicability of section 552.101 is such a compelling reason.

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. Section 16.012(m) of the Water Code provides in relevant part as follows:

The executive administrator may conduct surveys of entities using groundwater and surface water at intervals determined appropriate by the executive administrator to gather data to be used for long-term water supply planning. . . . Surveys obtained by the board from nongovernmental entities are excepted from the requirements of Section 552.021, Government Code, unless otherwise directed in writing by the person completing the survey.

Water Code § 16.012(m). Section 16.012(m) applies not only to surveys obtained by the board from nongovernmental entities subsequent to the effective date of section 16.012(m), but also to any surveys obtained by the board from nongovernmental entities prior to September 1, 2001. The law that added subsection (m) to section 16.012 does not limit the applicability of the provision to only those surveys that were conducted after the effective

date of the law. *See* Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 2.15, 2001 Tex. Gen. Laws 1999 (providing that effective date of Act is September 1, 2001). We agree that surveys of nongovernmental entities who have not directed in writing that their information may be released to the general public are confidential under section 16.012(m).

However, the requestor prefers to receive the responsive information in electronic format, if possible. The board states it maintains information taken from the surveys in electronic format, but that the electronic format does not include all of the information reported in the surveys. We find that the information maintained by the board in electronic format, which includes information taken from the surveys, may not be withheld under section 552.101 of the Government Code in conjunction with section 16.012(m) of the Water Code. Section 16.012(m) specifically excepts "surveys" from the requirements of section 552.021 of the Government Code. As the information maintained by the board in electronic format is not a "survey" within the meaning of chapter 16 of the Water Code, it is not protected by section 16.012(m). *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality controls scope of its protection); *see also* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential). Thus, the board must release the electronic data pertaining to the requested water use.

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 Dep't of Pub. 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 182668

Enc. Submitted documents

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(w/o enclosures)