



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2005

Mr. Michael G. Young
Assistant General Counsel
Texas Department of State Health Services
1100 West 49th Street
Austin, Texas 78756

OR2005-10417

Dear Mr. Young:

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# 236571.

The Texas Department of State Health Services (the "department") received a request for nine categories of information relating to the Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC"). You state that some of the requested information either has been or will be released. You have submitted other information that you claim is excepted from disclosure under section 552.101 of the Government Code.¹ We have considered the exception you claim and have reviewed the submitted information.²

Initially, we address the department's obligations under section 552.301 of the Government Code. Section 552.301 prescribes the procedures that must be followed in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and

¹You indicate that the information that you have not highlighted in the document marked "Request # 5" is not responsive to this request for information. This letter ruling does not address the public availability of non-responsive information, and such information need not be released.

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). Section 552.302 provides that if a governmental body does not request an attorney general decision as prescribed by section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

In this instance, the department failed to request this decision within the ten-business-day deadline prescribed by section 552.301. The department also failed to timely comply with section 552.301(e). The submitted information is therefore presumed to be public under section 552.302 and must be released, unless there is a compelling reason to withhold any of the information. The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). As the applicability of section 552.101 of the Government Code can provide a compelling reason for non-disclosure, we will consider your arguments under this exception.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information that other statutes make confidential. Section 552.101 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 WIC program 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. *See* 65 Fed. Reg. 83248, 83276 (2001). Furthermore, section 246.26(e) provides for the release of confidential vendor information in certain circumstances. *See* 7 C.F.R. § 246.26(e)(1)-(3).

You state that the submitted information individually identifies WIC vendors. You also state that these vendors sell nothing but WIC-authorized products. Based on your representations and our review of the submitted information, we find that it consists of information about vendors that individually identifies the vendors. We note that the submitted information contains the names and addresses of vendors. However, we find that where, as here, the request is for information pertaining to WIC-only stores, the release of the vendor names and addresses from the submitted information would necessarily reveal information about vendors beyond their names and addresses. We therefore conclude that all of the submitted information is subject to section 246.26(e) of title 7 of the Code of Federal Regulations. You inform us that none of the release provisions of section 246.26(e) is applicable in this instance. We therefore conclude that the submitted information is confidential in its entirety under section 246.26(e) and must be withheld from the requestor 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, upon receiving this ruling, the governmental body

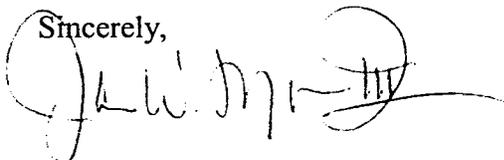
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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 Office of the Attorney General 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. 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 'James W. Morris, III', with a large, stylized flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 236571

Enc: Submitted documents

c: Ms. Elizabeth Sammon
The Marit Group Inc.
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(w/o enclosures)