



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 10, 2010

Mr. Monty Waters
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2010-12075

Dear Mr. Waters:

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# 389961 (DSHS File 017469-2010).

The Texas Department of State Health Services (the "department") received a request for communications between the department and CareMax Medical Resources LLC ("CareMax") regarding an outbreak of *Serratia Marcescens* in 2007 and/or 2008, and for information related to any recall of a certain product during the same time period. You state some responsive information has been or will be released to the requestor. You claim that the remaining 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 information.

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 information made confidential by other statutes, like section 81.046 of the Health and Safety Code, which provides in part:

- (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 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 [the Act], 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 of the Health and Safety Code is confidential and may not be released unless an exception set out in the statute applies. *See id.* § 81.046(b)-(d), (f); ORD 577. You state the submitted information was either furnished to or created or gathered by the department and is related to cases or suspected cases of diseases or health conditions. Thus, we agree that section 81.046(b) governs the release of this information. You do not inform us that any of the release provisions of section 81.046 are applicable in this instance. Accordingly, based upon your representations and our review of the submitted information, we agree that 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.

Next, we address your claim that some of the requested information is excepted from disclosure pursuant to federal law. You state that the Food and Drug Administration (the "FDA") contracts with the department to conduct inspections under the authority of federal law and that the inspections are conducted by department employees who are commissioned officers of the FDA. You inform this office that the inspection reports created by the department are then submitted to the FDA. You assert that the FDA has informed the department that the reports and any information obtained from the inspections are confidential pursuant to sections 301 and 331(j) of title 21 of the United States Code. Further, you indicate some of the requested documents consist of information, compiled by department investigators as FDA commissioned officers, which is confidential under section 20.64 of title 21 of the Code of Federal Regulations. *See* 21 C.F.R. § 20.64 (stating certain records compiled for law enforcement purposes may be withheld from public disclosure). Sections 301 and 331(j) of title 21 of the United States Code provide that the Federal Food, Drug, and Cosmetic Act prohibits the disclosure of certain confidential information, such as trade secrets acquired in an official capacity. You also refer to section 20.88, title 21, of the Code of Federal Regulations, which states in relevant part:

(c) Communications with State and local government officials who are not commissioned pursuant to 21 U.S.C. 372(a) or under a contract to perform law enforcement activities shall have the same status as communications with any member of the public, except that:

(1) Investigatory records compiled for law enforcement purposes by State and local government officials who perform counterpart functions to the [FDA] at the State and local level, and trade secrets and confidential commercial or financial information obtained by such officials, which are voluntarily disclosed to the [FDA] as part of cooperative law enforcement and regulatory efforts, shall be exempt from public disclosure to the same extent to which the records would be so exempt pursuant to §§ 20.61 and 20.64, as if they had been prepared by or submitted directly to [FDA] employees, except that investigatory records shall be exempt from disclosure for a longer period of time if the State or local government officials so require as a condition of their furnishing the information to the [FDA].

(2) Disclosure of investigatory records compiled for law enforcement purposes by the [FDA] to State and local government officials who perform counterpart functions to the [FDA] at the State and local level as part of cooperative law enforcement efforts does not invoke the rule established in § 20.21 that such records shall be made available for disclosure to all members of the public.

21 C.F.R. § 20.88(c). You assert that because this office is not commissioned by the FDA, section 20.88(c) prohibits you from disclosing the requested investigatory records to this office. Thus, because you have not provided this office with the investigatory documents at issue, we are unable to make any determination regarding such documents.

You ask this office to issue a previous determination that would permit the department to withhold information under section 81.046 of the Health and Safety Code without the necessity of requesting a decision by this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (previous determinations). You also ask this office to issue a previous determination that would permit the department to withhold information under section 161.0213 of the Health and Safety Code; we note, however, that you did not raise section 161.0213 as an exception to disclosure in this instance. *See* Gov't Code § 552.301(a); ORD 673. We decline to issue such a decision at this time. 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,

A handwritten signature in black ink, appearing to read "C. Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 389961

Enc. Submitted documents

c: Requestor
(w/o enclosures)