



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

September 27, 2010

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

OR2010-14678

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#394901 (DSHS File: 17659-2010).

The Texas Department of State Health Services (the "department") received a request for the nicotine data reported by manufacturers for Camel Snus and Marlboro Snus for all years reported. Although you take no position on the requested information, you state it may be excepted from disclosure under section 552.101 of the Government Code. You further state release of this information may implicate the proprietary interests of Reynolds American, Inc. ("Reynolds") and Philip Morris USA, Inc. ("Philip Morris"). Accordingly, you have notified Reynolds and Philip Morris of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the department's procedural obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). In this instance, you state the department received the request for information on June 25, 2010. You provide documentation showing the department sought and received

clarification of this request on July 6, 2010. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request). As we have no indication the department acted in bad faith in seeking clarification in this case, we consider the department's ten-day period for requesting a decision under section 552.301(b) to have commenced on July 6, 2010. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). However, you did not request a ruling from this office until July 22, 2010. Thus, we find the department failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption 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 id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential by law. *See* Open Records Decision No. 150 at 2 (1977). Because section 552.101 can provide a compelling reason to withhold information, we will consider the applicability of this exception to the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes such as chapter 161 of the Health and Safety Code. Chapter 161 requires tobacco manufacturers to file an annual report with the department, which lists the identity of each ingredient and the nicotine yield rating in their cigarette and tobacco products. Health & Safety Code § 161.352. Section 161.354 provides:

(a) Except as provided by Subsections (b), (c), and (d), information included in a report filed under this subchapter is public information and is not confidential unless it is determined to be confidential under this section.

(b) The department may not disclose information under Subsection (a) until the department has obtained the advice of the attorney general under this section with respect to the particular information to be disclosed. If the attorney general determines that the disclosure of particular information would constitute an unconstitutional taking of property, the information is confidential and the department shall exclude that information from disclosure.

(c) Information included in a report filed under this subchapter is confidential if the department determines that there is no reasonable scientific basis for concluding that the availability of the information could reduce risks to public health.

(d) Information included in a report filed under this subchapter is confidential under [the Act] if the information would be excepted from public disclosure as a trade secret under state or federal law.

Id. § 161.354.¹ You state the department has examined the instant request for information and cannot determine “that there is no reasonable scientific basis for concluding that the availability of the information could reduce risks to public health.” Thus, you state the requested information cannot be withheld under section 161.354(c). Accordingly, you ask this office to determine whether release of the submitted information would constitute an unconstitutional taking under section 161.354(b) or whether the submitted information is confidential under the Act and thus exempt from disclosure as a trade secret under state or federal law pursuant to section 161.354(d).

Subsection (d) of section 161.354 makes information included in a report submitted to the department under chapter 161 confidential under the Act if the information would be excepted from public disclosure as a trade secret under state or federal law. The Comprehensive Smokeless Tobacco Health Education Act of 1986 (the “Smokeless Tobacco Act”) requires tobacco manufacturers to file an annual report with the Secretary of Health and Human Services listing the ingredients added to tobacco in the manufacture of smokeless tobacco products, as well as the quantity of nicotine contained in each product. 15 U.S.C. § 4403(a). Section 4403(b)(2)(A) of the Smokeless Tobacco Act specifically provides

Any information provided to the Secretary under subsection (a) of this section shall be treated as a trade secret or confidential information subject to section 552(b)(4) of Title 5 [providing a trade secret exemption for disclosure under the Freedom of Information Act] and shall not be revealed, except as provided in paragraph (1), to any person other than those authorized by the Secretary in carrying out their official duties under this section.

Id. § 4403(b)(2)(A). In Open Records Decision No. 662 (1999), our office determined it was the intent of the legislature in adopting subsection (d) of section 161.354 that information excepted from public disclosure as a trade secret under the federal Smokeless Tobacco Act would also be confidential when reported to the department under chapter 161 and thus not subject to disclosure under the Act. *See* ORD 662 at 4-5. The submitted information consists of nicotine yield ratings reported to the department under chapter 161 of the Health and Safety Code. Accordingly, we conclude the department must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 161.354(d) of the Health and Safety Code.

¹We note the 76th Legislature renumbered section 161.254 to section 161.354 of the Health and Safety Code. Act of May 9, 2009, 76th Leg., R.S., ch. 62, § 19.01(64), 2009 Tex. Gen. Laws 412, 415.

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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID#394901

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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