

# Appendix D

September 2, 1998

**Summary of Consumers Union Concerns About the Reconsideration Process  
at the Open Records Division of the Attorney General**

**I. Background**

In a request for reconsideration, a governmental body asks the AG to overturn a ruling – in other words, to *reconsider* a previous position on an open records issue. In almost all of these cases, the request for reconsideration is filed in response to a ruling that materials held by a governmental entity are *open to the public*. The entity, preferring to keep the materials closed, asserts that the original ruling was mistaken and asks that it be overturned. (Cases in which the AG has ruled information *closed* and a governmental body argues it should be *open* are few and far between.) There is no provision in the Open Records statute that allows governmental entities to ask for reconsideration.

The Act clearly outlines the procedures for an AG opinion and subsequent appeals. Sec. 552.301 requires an agency to ask for an AG opinion within 10 business days from receipt of the request, in violation of these deadlines. Under the Act, agencies that do not provide “information that the attorney general has determined is public information” are subject to court action (suit for writ of mandamus under Sec. 552.321). And finally, the Act provides *clear guidance* in cases where an officer for public information disagrees

with an AG decision. Under Sec. 552.353(b)(3), an officer who reasonably believes that public access is not required may file a petition for a declaratory judgment, a writ of mandamus, or both seeking relief from compliance with an AG opinion.

Instead of following the statute, agencies and the Attorney General's office have created a potentially endless reconsideration process. Requests for reconsideration were once relatively rare, but have increased dramatically since 1995 (table 2).

## **II. Reconsideration Requests in 1997**

According to data provided by the Attorney General's Office, the AG issued 110 rulings on requests for reconsideration of AG open records opinions during 1997. Inspection of all 110 reconsideration rulings released in 1997 reveals that 10 were actually issued in response to requests for *clarification*, rather than *reconsideration*, leaving 100 AG opinions on requests for reconsideration issued during 1997. These 100 rulings, plus one that was issued in 1996 and two that were issued in 1998, are presented in table 1.

- The AG upheld its original opinion in 61 of these 100 cases (table 1).
- It overturned in whole or in part its initial opinion in 38 cases (27 overturns and 11 partial overturns). Thirty-seven of these reconsideration rulings were unfavorable to public access (i.e., the AG overturned or partially overturned prior rulings that favored openness) and one ruling

was favorable to public access (see table 1, Lottery Commission, OR97-1029). The 37 unfavorable rulings are discussed in detail in table 6.<sup>40</sup>

- Every time a governmental body requests a reconsideration, it extends the process by two to four months (given the AG's statutory review deadlines and the speed with which it is able to meet them). Thus, 61 requestors in 1997 were kept waiting unnecessarily by baseless requests for reconsideration (table 1).
- While nearly 40 percent of AG opinions were overruled in whole or in part upon reconsideration, the process did not have to go this far (table 1). Most of the issues raised in these 38 requests for reconsideration could have been resolved in the initial open records ruling if stronger procedures were in place at the AG's Office and within the governmental entities that requested reconsideration.
- Ten reconsideration rulings were issued in response to *second* requests for reconsideration on the same issue (table 1, bold type). In other words, the governmental body had already made one request for reconsideration and, having received an unfavorable response, submitted a second request for review in order to withhold the information at issue.

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<sup>40</sup> In the 100th case, the AG sent the issue back to the agency for a ruling after the requestor "raised relevant disputed factual and legal issues" that the AG could not itself resolve (table 1).

- In one case, the city of Corpus Christi went so far as to submit a *third* request for reconsideration (table 1). The AG first issued its ruling that disputed information should be open to public scrutiny on July 16, 1997. At that point, the requestor had already been waiting since about March 1997, when the city first asked the AG for permission to withhold the information. The city appealed the July decision on August 7, and when the AG upheld its original decision on Oct. 2, the city appealed again on October 14 and a third time on Dec. 18. The AG's final ruling on the matter – which upheld its *original* ruling – was issued on Feb. 6, 1998, nearly one year after the requestor's odyssey began.
- Although they account for only 26 percent of all requests sent to the AG (as measured by the number of opinion letters in 1997), state agencies account for almost half of all requests for reconsideration in 1997 (table 2).
- Of the 16 state agencies reviewed by Consumers Union, the Department of Insurance and to a lesser extent the Department of Transportation have accounted for a large number of requests for reconsideration in the past three years (table 3). The Department of Insurance filed 13 requests for reconsideration out of 111 total requests they referred to the AG in 1997 (table 4).

### **III. Overturms and Partial Overturms: A Closer Look**

As noted above, 38 of the 100 reconsideration ORLs (open records letters) issued during 1997 overturned or partially overturned a previous ruling, and 37 of these were unfavorable to public access. That is, in 37 cases the new decision permitted a governmental body to withhold at least a portion of the materials that the AG previously determined to be open. In order to determine whether these instances represent problems that cannot be solved by means other than the time-consuming reconsideration process, Consumers Union examined each reconsideration letter in which the AG overturned or partially overturned its previous ruling. (We did not review every document in the files and therefore there are some cases for which we have insufficient information to assess the situation.)

#### **K. Attorney General Procedural Problems**

Fifteen of the reconsideration requests that resulted in a new decision can be traced to problems at the Open Records Division itself (see tables 5 and 6)

- **Deadline Issues:** In many of these cases, the Attorney General mistakenly asserted that the governmental entity missed its deadline to file for an appeal. If an agency misses its deadline, then information is presumed open unless closed by statute or other compelling interest. When the agency could prove it complied with its deadline, the AG reconsidered the issues and overturned its initial decision. Consumers Union believes that such instances, while rare, can be avoided by the systematic attention to filing procedures that any law firm or clerk's office has in place.

- **A Second Bite at the Apple:** While the Open Records Division tries to discourage governmental bodies from reasserting the same arguments a second time around by generally upholding its initial decision, the AG occasionally changes its mind based on a restatement of the same arguments. It also occasionally allows a governmental body to assert new arguments when the first ones did not succeed. Consumers Union believes this behavior encourages governmental bodies to abuse the Open Records appeal process by trying for a second bite at the apple. The existing procedures are clear. If an agency does not like an AG determination, it can file in court for a temporary injunction.

## **B. Agency Procedural Problems**

Twelve of the reconsideration requests involve problems at the agency level that can also be addressed by greater attention to the procedures set out in the statute (see tables 5 and 6).

- **Deadline issues:** Agencies often miss the deadline set out in the statute for sending information on to the AG. If they return for a reconsideration with a “compelling interest” (such as a third-party interest or a statutory mandate), the Open Records division will overturn its initial decision.

- **Agency Fails to Provide Adequate Backup the First Time:** Following an initial ruling in favor of openness, governmental bodies will sometimes muster new information to back up their initial case for confidentiality. Such actions undermine the time frames that were put in place to ensure that the Attorney General could produce a reasonable open records ruling in a reasonable time. The AG currently sets up deadlines for agencies to file additional information, but generally will take supplemental information at any time before the determination letter comes out. With that much flexibility in the system, agencies should be able to provide the information they have in the time allotted.
- **Retroactive Application of a New Law or Open Records Decision:** After an AG opinion in favor of openness, a governmental body will sometimes hold back the information while the Legislature debates a new statute or the AG takes briefs on a new ORD which might effect the confidentiality of the information in the future. Regardless of the outcome of new legislation, agencies must release information to requestors when they have a current decision from the AG based on existing precedent, not wait then attempt to apply new laws retroactively. The Attorney General encourages this behavior by reconsidering these requests in light of the new statute or ORD.
- **Misunderstandings:** Agencies occasionally do not clarify a request until after they get a decision from the AG. Agencies should be encouraged to clarify requests as soon as they come in.

### **C. Problems Related to Third Parties**



~~Table 1~~ **Table 1: Attorney General Rulings on 1997 Requests for Reconsideration**  
*For the Senate Interim Committee on Public Information*  
 September 2, 1998

Six reconsideration requests that resulted in a new decision were initiated by third parties who failed to prove a case under (usually) the trade secret exception the first time around (see tables 5 and 6). In these cases the AG accepts additional arguments or information. Like governmental entities that fail to prove their case in the time allotted, these third parties also have adequate time, and receive adequate notice, to supply the Attorney General with the information it needs. Although not required under the statute, the AG sends out a notice to affected parties each time it gets a request for opinion involving third-party information. The notice gives specific guidance on the legal standard for proving a trade secret case (or other relevant exception), and includes copies of the most important Open Record Decisions (ORDs) setting legal precedent. This detailed guidance puts third parties on clear notice, yet some ignore the process or fail to provide necessary information until after the AG finds against them.

|             | Date AG        |                  | Date AG Receives | Date AG Issues  |                   |               |
|-------------|----------------|------------------|------------------|-----------------|-------------------|---------------|
|             | Issues Initial | Initial Ruling   | Request for      | Ruling on       | Ruling            |               |
| Type        | Ruling         | Issued as        | Reconsideration  | Reconsideration | Issued as         | Result        |
| City        | 11/25          | OR96-2198        | 12/10            | 02/05           | OR97-0263         | Upheld        |
| City        | 06/26          | OR97-1455        | 07/03            | 10/23           | OR97-2362         | Upheld        |
| City        | 03/07          | OR97-0496        | 03/27            | 06/12           | OR97-1375         | Upheld        |
| City        | 10/11          | OR96-1855        | 10/29            | 01/15           | OR97-0083         | Upheld        |
| <b>City</b> | <b>07/16</b>   | <b>OR97-1622</b> | <b>12/18</b>     | <b>02/06</b>    | <b>OR98-0382*</b> | <b>Upheld</b> |
| City        | 07/16          | OR97-1622        | 08/07            | 10/02           | OR97-2229         | Upheld        |
| <b>City</b> | <b>07/16</b>   | <b>OR97-1622</b> | <b>10/14</b>     | <b>12/05</b>    | <b>OR97-2658</b>  | <b>Upheld</b> |
| City        | 11/21          | OR96-2165        | 12/09            | 03/03           | OR97-0466         | Upheld        |
| City        | 03/25          | OR97-0613        | 04/24            | 06/10           | OR97-1350         | Upheld        |
| City        | 09/22          | OR97-2106        | 10/13            | 12/09           | OR97-2699         | Upheld        |

Table 1: Attorney General Rulings on 1997 Requests for Reconsideration

|             |              |                  |              |              |                  |               |
|-------------|--------------|------------------|--------------|--------------|------------------|---------------|
| City        | 09/20        | OR96-1722        | 10/04        | 01/03        | OR97-0005        | Upheld        |
| City        | 09/23        | OR97-2122        | 10/20        | 12/16        | OR97-2757        | Upheld        |
| City        | 10/17        | OR97-2318        | 11/06        | 12/30        | OR97-2838        | Upheld        |
| City        | 10/15        | OR96-1880        | 11/04        | 01/30        | OR97-0194        | Upheld        |
| <b>City</b> | <b>10/15</b> | <b>OR96-1880</b> | <b>02/06</b> | <b>04/11</b> | <b>OR97-0539</b> | <b>Upheld</b> |
| City        | 10/11        | OR96-1857        | 10/21        | 01/16        | OR97-0091        | Upheld        |
| City        | 10/31        | OR97-2422        | 11/17        | 12/30        | OR97-2839        | Upheld        |
| City        | 11/03        | OR97-2431        | 11/17        | 12/30        | OR97-2840        | Upheld        |
| City        | 08/29        | OR97-1964        | 09/15        | 10/17        | OR97-2306        | Upheld        |
| City        | 11/25        | OR96-2202        | 12/16        | 03/17        | OR97-0547        | Upheld        |
| City        | 06/23        | OR97-1423        | 06/30        | 09/19        | OR97-2094        | Upheld        |
| City        | 09/24        | OR97-2140        | 10/01        | 11/05        | OR97-2447        | Upheld        |
| College     | 11/06        | OR96-2045        | 11/18        | 01/10        | OR97-0048        | Upheld        |
| County      | 01/22        | OR97-0127        | 01/31        | 04/10        | OR97-0762        | Upheld        |
| County      | 04/15        | OR97-0820        | 04/21        | 07/11        | OR97-1578        | Upheld        |
| County      | 04/28        | OR97-0969        | 05/08        | 05/30        | OR97-1255        | Upheld        |
| County      | 09/24        | OR96-1755        | 01/21        | 03/25        | OR97-0619        | Upheld        |
| County      | 06/11        | OR97-1363        | 07/01        | 09/10        | OR97-2021        | Upheld        |
| HA          | 09/16        | OR97-2067        | 10/01        | 11/21        | OR97-2556        | Upheld        |
| ISD         | 04/14        | OR97-0800        | 04/25        | 07/21        | OR97-1647        | Upheld        |
| ISD         | 10/30        | OR97-2407        | 11/03        | 12/19        | OR97-2805        | Upheld        |
| ISD         | 04/16        | OR97-0855        | 04/29        | 06/03        | OR97-1277        | Upheld        |
| State       | 12/10        | OR96-2337        | 12/23        | 03/20        | OR97-0575        | Upheld        |
| State       | 12/17        | OR96-2417        | 02/20        | 05/15        | OR97-1105        | Upheld        |
| State       | 05/20        | OR97-1150        | 06/06        | 07/10        | OR97-1561        | Upheld        |
| State       | 05/30        | OR97-1246        | 07/09        | 10/03        | OR97-2230        | Upheld        |
| State       | 03/13        | OR97-0538        | 05/16        | 07/18        | OR97-1631        | Upheld        |
| State       | 04/28        | OR97-0952        | 05/13        | 09/05        | OR97-1996        | Upheld        |
| State       | 02/12        | OR97-0332        | 02/25        | 04/24        | OR97-0935        | Upheld        |
| State       | 04/24        | OR97-0921        | 05/08        | 07/14        | OR97-1585        | Upheld        |
| State       | 10/01        | OR97-2209        | 10/21        | 12/11        | OR97-2718        | Upheld        |
| State       | 10/09        | OR97-2246        | 11/06        | 12/30        | OR97-2843        | Upheld        |
| State       | 11/25        | OR97-2603        | 11/06        | 12/30        | OR97-2843        | Upheld        |
| State       | 08/21        | OR96-1514        | 09/03        | 12/02        | OR96-2276**      | Upheld        |
| State       | 11/26        | OR96-2261        | 12/20        | 03/21        | OR97-0583        | Upheld        |

Table 1: Attorney General Rulings on 1997 Requests for Reconsideration

|               |              |                  |              |              |                  |                            |
|---------------|--------------|------------------|--------------|--------------|------------------|----------------------------|
| State         | 01/15        | OR97-0074        | 01/28        | 03/28        | OR97-0642        | Upheld                     |
| <b>State</b>  | <b>01/15</b> | <b>OR97-0074</b> | <b>04/11</b> | <b>06/10</b> | <b>OR97-1349</b> | <b>Upheld</b>              |
| State         | 08/07        | OR97-1773        | 08/19        | 10/16        | OR97-2304        | Upheld                     |
| State         | 07/24        | OR97-1710        | 08/07        | 11/03        | OR97-2435        | Upheld                     |
| State         | 04/27        | OR95-0237        | 05/15        | 03/18        | ORD 653          | Upheld                     |
| State         | 06/11        | OR97-1355        | 06/20        | 09/11        | OR97-2025        | Upheld                     |
| State         | 06/09        | OR97-1317        | 06/20        | 09/12        | OR97-2037        | Upheld                     |
| State         | 06/27        | OR97-1484        | 07/21        | 10/15        | OR97-2294        | Upheld                     |
| State         | 09/12        | OR97-2046        | 09/26        | 11/21        | OR97-2555        | Upheld                     |
| State         | 09/25        | OR96-1757        | 10/23        | 01/15        | OR97-0072        | Upheld                     |
| State         | 02/28        | OR97-0441        | 03/13        | 04/21        | OR97-0893        | Upheld                     |
| State         | 10/22        | OR96-1090        | 11/04        | 01/29        | OR97-0190        | Upheld                     |
| State         | 12/11        | OR96-2352        | 12/23        | 03/12        | OR97-0530        | Upheld                     |
| State         | 12/12        | OR96-2380        | 12/30        | 03/24        | OR97-0601        | Upheld                     |
| State         | 02/13        | OR97-0336        | 02/24        | 05/15        | OR97-1109        | Upheld                     |
| State         | 02/13        | OR97-0337        | 02/24        | 05/15        | OR97-1109        | Upheld                     |
| State         | 03/31        | OR97-0653        | 04/03        | 06/27        | OR97-1471        | Upheld                     |
| State         | 07/15        | OR97-1609        | 07/25        | 10/09        | OR97-2255        | Upheld                     |
| State         | 07/18        | OR97-1645        | 08/04        | 10/09        | OR97-2255        | Upheld                     |
| <b>State</b>  | <b>10/09</b> | <b>OR97-2255</b> | <b>11/24</b> | <b>12/12</b> | <b>OR97-2737</b> | <b>Upheld</b>              |
| City          | 10/13        | OR97-2269        | 10/21        | 12/11        | OR97-2717        | Partially Overruled        |
| City          | 09/23        | OR97-2124        | 10/08        | 12/12        | OR97-2739        | Partially Overruled        |
| College       | 09/12        | OR97-2043        | 09/22        | 11/03        | OR97-2428        | Partially Overruled        |
| <b>County</b> | <b>04/15</b> | <b>OR97-0820</b> | <b>07/18</b> | <b>10/14</b> | <b>OR97-2289</b> | <b>Partially Overruled</b> |
| ISD           | 11/01        | OR96-2066        | 11/15        | 02/05        | OR97-0251        | Partially Overruled        |
| LTA           | 10/28        | OR97-2389        | 11/07        | 12/19        | OR97-2808        | Partially Overruled        |
| P/R/W         | 09/24        | OR97-2134        | 09/30        | 12/03        | OR97-2636        | Partially Overruled        |
| P/R/W         | 11/14        | OR96-2119        | 11/27        | 02/19        | OR97-0373        | Partially Overruled        |
| State         | 05/29        | OR97-1237        | 06/19        | 09/11        | OR97-2024        | Partially Overruled        |
| State         | 05/02        | OR97-1012        | 05/30        | 07/21        | OR97-1659        | Partially Overruled        |
| State         | 07/23        | OR97-1681        | 08/01        | 10/09        | OR97-2254        | Partially Overruled        |
| City          | 01/14        | OR97-0053        | 01/21        | 04/11        | OR97-0778        | Overruled                  |
| City          | 04/15        | OR97-0838        | 04/23        | 06/12        | OR97-1372        | Overruled                  |
| City          | 04/08        | OR97-0741        | 04/21        | 05/27        | OR97-1220        | Overruled                  |
| City          | 11/13        | OR96-2082        | 11/18        | 02/10        | OR97-0318        | Overruled                  |

Table 1: Attorney General Rulings on 1997 Requests for Reconsideration

|              |              |                  |              |              |                   |                       |
|--------------|--------------|------------------|--------------|--------------|-------------------|-----------------------|
| City         | 05/08        | OR97-1063        | 05/30        | 09/18        | OR97-2102         | Overruled             |
| City         | 02/06        | OR97-0286        | 02/13        | 04/16        | OR97-0849         | Overruled             |
| City         | 04/10        | OR97-0758        | 04/21        | 06/30        | OR97-1506         | Overruled             |
| City         | 06/26        | OR97-1459        | 07/11        | 09/11        | OR97-2034         | Overruled             |
| City         | 06/30        | OR97-1493        | 07/11        | 09/11        | OR97-2034         | Overruled             |
| City         | 06/10        | OR97-1346        | 07/18        | 09/30        | OR97-2199         | Overruled             |
| City         | 04/16        | OR97-0846        | 04/22        | 06/26        | OR97-1468         | Overruled             |
| City         | 09/29        | OR97-2195        | 10/09        | 12/11        | OR97-2716         | Overruled             |
| County       | 02/10        | OR97-0306        | 02/18        | 04/17        | OR97-0867         | Overruled             |
| County       | 09/24        | OR97-2142        | 10/01        | 12/05        | OR97-2647         | Overruled             |
| ISD          | 10/28        | OR96-1948        | 11/15        | 02/11        | OR97-0326         | Overruled             |
| ISD          | 05/05        | OR97-1028        | 05/12        | 07/23        | OR97-1674         | Overruled             |
| ISD          | 02/07        | OR97-0298        | 02/12        | 03/28        | OR97-0644         | Overruled             |
| State        | 11/26        | OR96-2262        | 01/10        | 04/04        | OR97-0719         | Overruled             |
| <b>State</b> | <b>03/13</b> | <b>OR97-0538</b> | <b>07/31</b> | <b>08/01</b> | <b>OR97-1753</b>  | <b>Overruled</b>      |
| State        | 04/02        | OR97-0683        | 04/08        | 06/13        | OR97-1381         | Overruled             |
| <b>State</b> | <b>08/21</b> | <b>OR96-1514</b> | <b>12/06</b> | <b>03/04</b> | <b>OR97-0477</b>  | <b>Overruled</b>      |
| State        | 02/09        | OR96-0165        | 12/23        | 03/18        | OR97-0550         | Overruled             |
| <b>State</b> | <b>11/26</b> | <b>OR96-2261</b> | <b>04/07</b> | <b>06/26</b> | <b>OR97-1469</b>  | <b>Overruled</b>      |
| State        | 03/11        | OR97-0521        | 05/27        | 09/18        | OR97-2088         | Overruled             |
| State        | 05/09        | OR97-1080        | 05/27        | 09/18        | OR97-2088         | Overruled             |
| State        | 05/16        | OR97-1126        | 05/27        | 09/18        | OR97-2088         | Overruled             |
| State        | 05/16        | OR97-1127        | 05/27        | 09/18        | OR97-2088         | Overruled             |
| State        | 05/16        | OR97-1128        | 05/27        | 09/18        | OR97-2088         | Overruled             |
| <b>State</b> | <b>07/24</b> | <b>OR97-1710</b> | <b>11/24</b> | <b>02/05</b> | <b>OR98-0351*</b> | <b>Overruled</b>      |
| State        | 04/23        | OR97-0916        | 04/28        | 05/05        | OR97-1029         | Overruled             |
| <b>State</b> | <b>02/28</b> | <b>OR97-0441</b> | <b>05/05</b> | <b>06/16</b> | <b>OR97-1405</b>  | <b>Overruled</b>      |
| State        | 09/29        | OR97-2187        | 10/30        | 12/12        | OR97-2745         | Overruled             |
| State        | 03/07        | OR97-0486        | 03/17        | 05/15        | OR97-1121         | Overruled             |
| State        | 02/10        | OR97-0301        | 03/03        | 05/27        | OR97-1224         | Deferred to agency*** |

Note: Bold lettering = second request for reconsideration on same issue; bold + italicized lettering = third request for consideration on the same issue.

\*OR98-0351 and OR98-0382 are included in the table because they originated in 1997 requests for reconsiderations

## Table 1: Attorney General Rulings on 1997 Requests for Reconsideration

\*\*OR96-2276 is included in the table because it precedes and deals with the same issue as OR97-0477, released on 3/4/97.

\*\*\*The AG sent this issue back to the Insurance Department to make findings after the requestor “raised relevant disputed factual and legal issues.”

Consumers Union Analysis of Reconsiderations  
 For the Senate Interim Committee on Public Information  
 September 2, 1998

TABLE 2: Number of AG Open Record Letter (ORL) Rulings on Requests for Reconsideration (Appeals)  
 from All Governmental Bodies, 1988-98

|                                   | 1988     | 1989     | 1990     | 1991     | 1992     | 1993     | 1994     | 1995      | 1996      | 1997         | 1998*     |
|-----------------------------------|----------|----------|----------|----------|----------|----------|----------|-----------|-----------|--------------|-----------|
| State Agencies                    | 2        | 2        | 0        | 0        | 0        | 0        | 2        | 16        | 29        | 49           | 18        |
| Cities                            | 2        | 0        | 0        | 0        | 1        | 2        | 4        | 10        | 23        | 37           | 30        |
| Counties                          | 0        | 0        | 0        | 0        | 0        | 0        | 0        | 2         | 10        | 10           | 4         |
| School Districts                  | 0        | 0        | 0        | 0        | 1        | 0        | 1        | 2         | 8         | 8            | 5         |
| Colleges/Universities             | 1        | 0        | 0        | 0        | 0        | 0        | 1        | 1         | 4         | 3            | 3         |
| Judicial Districts                | 0        | 0        | 0        | 0        | 0        | 1        | 0        | 0         | 1         | 0            | 0         |
| Port, River and Water Authorities | 0        | 0        | 0        | 0        | 0        | 0        | 0        | 0         | 4         | 2            | 0         |
| Transit Agencies                  | 0        | 0        | 0        | 0        | 0        | 0        | 0        | 0         | 2         | 1            | 1         |
| Other Governmental Entities       | 0        | 0        | 0        | 0        | 0        | 0        | 0        | 1         | 1         | 0            | 1         |
| <b>TOTAL</b>                      | <b>5</b> | <b>2</b> | <b>0</b> | <b>0</b> | <b>2</b> | <b>3</b> | <b>8</b> | <b>32</b> | <b>82</b> | <b>110**</b> | <b>62</b> |

**Source:** Data provided by the Texas Attorney General's Office and supplemented by manual review of all reconsideration letters issued during 1997. Table prepared for Senate Interim Committee on Public Information by Consumers Union Southwest Regional Office, Austin, Texas, September 1998.

**Note:** The numbers shown are based *only* on the requests for reconsideration for which the AG issued a ruling. The AG issues rulings only when a government entity requests a reconsideration. The AG does not write open records letters (ORLs) in response to *citizens* who request a reconsideration of a previous ruling.

\* January 1-May 7.

\*\* In reviewing the ORLs for 1997, we determined that 10 of these 110 were actually requests for *clarification*, rather than requests for *reconsideration*. In a request for clarification, the entity does not ask the AG's office to overturn its previous ruling, but to clarify it. The AG's office does not distinguish between requests for clarification and reconsideration in its database; therefore it is likely that the totals for 1995, 1996, and 1998 include AG responses to clarifications (we examined the few decisions issued during 1988-94 and determined that they all related to requests for reconsideration). Given that AG reconsideration letters outnumber clarifications 10 to 1 in 1997, we would expect about the same ratio for 1995, 1996, and 1998.

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**TABLE 3: Number of AG Open Record Letter (ORL) Rulings on Requests for Reconsideration  
 (Appeals)  
 from Select State Agencies and the UT System, 1988-98**

|                                      | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998* |
|--------------------------------------|------|------|------|------|------|------|------|------|------|------|-------|
| Dept. of Banking                     | 0    | 0    | 0    | 0    | 0    | 0    | 1    | 0    | 0    | 1    | 1     |
| Comptroller                          | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 1    | 2    | 3    | 2     |
| Education Agency                     | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0     |
| Employee Retirement System           | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0     |
| General Services Commission          | 0    | 1    | 0    | 0    | 0    | 0    | 0    | 1    | 0    | 0    | 0     |
| Dept. of Health                      | 1    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 1    | 3    | 1     |
| Health and Human Services Commission | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 1     |
| Dept. of Housing & Community Affairs | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0     |
| Department of Human Services         | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 2     |
| Dept. of Insurance                   | 0    | 1    | 0    | 0    | 0    | 0    | 0    | 2    | 2    | 13   | 1     |
| Natural Resource Conservation Comm.  | ---  | ---  | ---  | ---  | ---  | 0    | 0    | 0    | 4    | 1    | 1     |
| Air Control Board                    | 0    | 0    | 0    | 0    | 0    | 0    | ---  | ---  | ---  | ---  | ---   |
| Water Commission                     | 0    | 0    | 0    | 0    | 0    | 0    | ---  | ---  | ---  | ---  | ---   |
| Parks and Wildlife Department        | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 3    | 0     |
| Public Utility Comm.                 | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0     |
| Department of Transportation         | 0    | 0    | 0    | 0    | 0    | 0    | 1    | 2    | 6    | 4    | 1     |
| Workforce/<br>Employment Comm.       | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 2    | 0    | 0    | 0     |



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|                                   |          |          |          |          |          |          |          |          |           |           |           |
|-----------------------------------|----------|----------|----------|----------|----------|----------|----------|----------|-----------|-----------|-----------|
| <b>University of Texas System</b> | 0        | 0        | 0        | 0        | 0        | 0        | 1        | 0        | 1         | 0         | 0         |
| <b>TOTAL</b>                      | <b>1</b> | <b>2</b> | <b>0</b> | <b>0</b> | <b>0</b> | <b>0</b> | <b>3</b> | <b>8</b> | <b>16</b> | <b>28</b> | <b>10</b> |

**Source:** Data provided by the Texas Attorney General’s Office and supplemented by manual review of open records letters. Table prepared for Senate Interim Committee on Public Information by Consumers Union Southwest Regional Office, Austin, Texas, September 1998.

**Note:** The numbers shown are based *only* on the requests for reconsideration for which the AG issued a ruling. The AG issues rulings only when a government entity requests a reconsideration. The AG does not write open records letters (ORLs) in response to *citizens* who request a reconsideration of a previous ruling.

\* January 1-May 7.

**TABLE 4: Number of Open Records Requests Referred to AG's Office  
 by Select State Agencies and the UT System, 1988-98**

|                                      | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998* |
|--------------------------------------|------|------|------|------|------|------|------|------|------|------|-------|
| Dept. of Banking                     | 1    | 1    | 5    | 7    | 2    | 19   | 10   | 12   | 3    | 6    | 4     |
| Comptroller                          | 2    | 1    | 3    | 3    | 2    | 10   | 15   | 43   | 27   | 45   | 16    |
| Education Agency                     | 1    | 4    | 5    | 2    | 2    | 4    | 5    | 26   | 13   | 12   | 6     |
| Employee Retirement System           | 0    | 0    | 3    | 0    | 0    | 1    | 3    | 0    | 3    | 10   | 2     |
| General Services Commission          | 2    | 3    | 5    | 1    | 3    | 4    | 5    | 14   | 10   | 3    | 3     |
| Dept. of Health                      | 5    | 3    | 8    | 14   | 10   | 8    | 7    | 26   | 34   | 115  | 43    |
| Health and Human Services Commission | 0    | 0    | 0    | 0    | 0    | 1    | 0    | 1    | 4    | 8    | 4     |
| Dept. of Housing & Community Affairs | 3    | 0    | 1    | 2    | 0    | 0    | 6    | 5    | 3    | 3    | 1     |
| Department of Human Services         | 9    | 4    | 17   | 16   | 13   | 15   | 25   | 15   | 19   | 37   | 10    |
| Dept. of Insurance                   | 16   | 17   | 53   | 52   | 51   | 106  | 81   | 76   | 64   | 111  | 24    |
| Natural Resource Conservation Comm.  | ---  | ---  | ---  | ---  | ---  | 11   | 51   | 59   | 69   | 82   | 16    |
| Air Control Board                    | 2    | 2    | 4    | 2    | 7    | 38   | ---  | ---  | ---  | ---  | ---   |
| Water Commission                     | 3    | 2    | 6    | 6    | 9    | 23   | ---  | ---  | ---  | ---  | ---   |
| Parks and Wildlife Department        | 0    | 2    | 0    | 0    | 3    | 8    | 8    | 26   | 23   | 23   | 1     |
| Public Utility Comm.                 | 0    | 0    | 0    | 2    | 1    | 0    | 0    | 3    | 2    | 3    | 1     |
| Department of Transportation         | 11   | 15   | 30   | 18   | 15   | 29   | 52   | 76   | 101  | 78   | 28    |
| Workforce/<br>Employment Comm.       | 2    | 3    | 5    | 2    | 6    | 0    | 0    | 0    | 7    | 5    | 1     |
| University of Texas                  | 4    | 9    | 7    | 16   | 12   | 16   | 17   | 31   | 30   | 41   | 10    |

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|               |           |           |            |            |            |            |            |            |            |            |            |
|---------------|-----------|-----------|------------|------------|------------|------------|------------|------------|------------|------------|------------|
| <b>System</b> |           |           |            |            |            |            |            |            |            |            |            |
| <b>TOTAL</b>  | <b>61</b> | <b>66</b> | <b>152</b> | <b>143</b> | <b>136</b> | <b>293</b> | <b>285</b> | <b>428</b> | <b>412</b> | <b>582</b> | <b>170</b> |

**Source:** Data compiled by the Texas Attorney General’s Office and supplemented by manual review of open records letters for the 1988-92 period. Table prepared for Senate Interim Committee on Public Information by Consumers Union Southwest Regional Office, Austin, Texas, September 1998.

**Note:** The numbers for 1988-92 may slightly underestimate the total number of open records referrals to the AG by agencies. These figures represent the number of AG *rulings* issued each year (rulings take the form of open record letters [ORLs] -- including AG responses to requests for reconsideration of previous rulings -- and open records decisions [ORDs]). The figures for the latter period represent the number of *requests* for rulings made by governmental entities each year. The AG’s office does not have *request* data for the 1988-92 period. The figures for the Texas Air Control Board and Texas Water Commission in 1993 were compiled from manual review of ORLs by Consumers Union.

\* January 1-March 26.

**TABLE 5: Categorizing the 26 Overturns and 11 Partial Overturns in 1997: Where Does the Problem Lie?**

| Category   | Frequency |
|--|-----------|
| <b>Category 1:</b> Problem Lies with Attorney General’s Office, and Can Be Fixed through Procedural Changes                      | 16        |
| <b>Category 2:</b> Problem Lies with Governmental Entity Requesting Reconsideration, and Can Be Fixed through Procedural Changes | 13        |
| <b>Category 3:</b> Insufficient Information  | 4         |
| <b>Category 4:</b> Third Party takes a Second Bite at the Apple  | 4         |
| <b>Total</b>   | 37        |

**Source:** Data compiled from records available at the Texas Attorney General’s Office. Table prepared for Senate Interim Committee on Public Information by Consumers Union Southwest Regional Office, Austin, Texas, September 1998.

**Notes:** **Category 1** includes situations in which the Attorney General’s Office simply changes its mind and overrules a previous decision following an appeal or mistakenly asserts in an initial ruling that a governmental body missed a deadline. It also includes situations in which the affected entity advances a new argument to persuade the AG to reverse its prior decision. **Category 2** includes situations in which new facts are brought to light following the release of an Open Records Letter or an affected entity misses a deadline and then shows a “compelling interest” against disclosure. It also includes situations in which there was a misunderstanding that seemed preventable on the part of the entity requesting reconsideration. **Category 3** Union could not easily determine the chain of events without further investigation. In **Category 4**, an affected third party initially submitted inadequate information to the AG and later submitted new information or arguments.

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**TABLE 6: AG Decisions to *Partially Overturn* and *Overturn* Prior Rulings Favorable to Public Access in 1997: A Review**

| Governmental Entity                | Reconsideration Open Records # | Factors Behind PARTIAL OVERTURN   |
|------------------------------------|--------------------------------|---|
| <i>City</i>                        |                                |   |
| 1. Austin                          | OR97-2717                      | <b>Third Party Reconsiderations (Category 4):</b> AG initially ruled that city could withhold some sections of an operations manual under the “trade secrets” exception (552.110), but had to release other sections. The affected company argued that certain references in its original brief to the AG “were incorrect” due to “confusion as to which version” of the company’s operations manual was being used by the city. The AG subsequently reversed, in part, its initial decision. |
| 2. Houston                         | OR97-2739                      | <b>Insufficient Information (Category 3):</b> In its initial ruling, the AG thought the city intended to release certain disputed information. In its request for reconsideration, the city stated this was true of only some of the materials at issue. The city claimed that other information was protected from disclosure by the state Health and Safety Code (confidential by law, exception 552.101). The AG agreed.   |
| <i>County</i>                      |                                |   |
| 3. Harris                          | OR97-2289                      | <b>Misunderstanding request (Category 2):</b> This is the second request for reconsideration on the same issue. The county initially misunderstood what kind of information the requestor wanted. Later, county officials realized they did not have the desired information. The AG then partially overruled its prior decisions to note that the county is not required to give out information it does not have or control.  |
| <i>Independent School District</i> |                                |   |
| 4. Texarkana                       | OR97-0251                      | <b>Second Bite at the Apple (Category 1):</b> AG initially ruled that some information can be withheld under the “trade secrets” exception (552.110), but that the remainder must be released. The school district subsequently asked to withhold one additional statement in a document otherwise subject to disclosure. The AG concluded the statement should be withheld.  |
| <i>Port/Water Authority</i>        |                                |   |
| 5. Elmo Water Supply Corporation   | OR97-2636                      | <b>Agency Fails to Provide Adequate Facts Initially (Category 2):</b> AG initially ruled that the corporation could not withhold certain information under the “litigation” exception (552.103). When the AG issued its initial ruling, the corporation notified the AG of “new issues” that arose “regarding anticipated litigation.” AG subsequently reversed, in part, its initial ruling.   |
| 6. Galveston Wharves               | OR97-0373                      | <b>A Second Bite at the Apple (Category 1):</b> AG initially held that certain portions of disputed documents were confidential by law (exception 552.101), but that the remainder should be released. Galveston Wharves subsequently disputed that finding. AG writes  |

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in response: “[Y]ou disagree with our markings. Upon reconsideration, we agree that certain [additional] information should be redacted to protect confidential information that must be withheld from disclosure. We have remarked the documents in question accordingly.”

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| <b>Governmental Entity</b>    | <b>Reconsideration Open Records #</b> | <b>Factors Behind PARTIAL OVERTURN</b>   |
|-------------------------------|---------------------------------------|--|
| <b>State Agency</b>           |                                       |  |
| 7. Agriculture Dept.          | OR97-2024                             | <b>Affected Entity Misses Deadline, then Shows a “Compelling Interest” Against Disclosure (Category 2):</b> AG initially held that information about two seed companies was open to the public after the department failed to provide copies of the requested information to the AG in a timely manner as required by the Open Records Act. (Requested information is presumed to be public when an entity fails to provide required information within the prescribed period. The presumption of openness can only be overcome by showing that the information is made confidential by another source of law or affects third-party interests. In other words, the entity must demonstrate a “compelling interest” against disclosure.) Following the initial ruling, the department asked the AG to consider a request for reconsideration by one of the affected companies. The company asserted that the information is confidential under the “trade secrets” exception (552.110). The AG agreed. |
| 8. Insurance Dept.            | OR97-1659                             | <b>Second Bite at the Apple (Category 1):</b> AG initially ruled that certain information pertaining to a department investigation of an insurance company could be withheld, but some must be released. In response, the department claimed it should be permitted to withhold more information under the “attorney-client privilege” (552.107) and “agency memoranda” (552.111) exceptions than the AG originally allowed. The AG disagreed and declined to change its original ruling. On a separate issue, the department argued that other information was made confidential by the state Insurance Code and therefore should be withheld (“confidential by law” exception, 552.101). Originally, the department had argued the information was protected by the “informer’s privilege” exception (552.101), but the AG rejected that assertion. The AG accepted the new argument, however, and allowed the department to withhold various materials protected by the statute.                    |
| 9. Insurance Dept.            | OR97-2254                             | <b>Third Party Makes a New Argument (Category 4):</b> In a decision dealing with three companies, the AG ruled that one company did not demonstrate that certain information was protected by the “trade secrets” exception (552.110). The company submitted additional arguments which showed the release of the information “would cause it to suffer substantial competitive harm.” The AG agreed.  |
| <b>Transportation Agency</b>  |                                       |  |
| 10. Capital Metro (Austin)    | OR97-2808                             | <b>Second Bite at the Apple (Category 1):</b> AG initially held that some disputed information can be withheld under the “trade secrets” exception (552.110), but that other material must be released. The affected company then argued that part of the disputed information should in fact be withheld. The AG agreed with the company’s additional arguments.  |
| <b>University</b>             |                                       |  |
| 11. University of North Texas | OR97-2428                             | <b>Affected Entity Makes a New Argument (Category 1):</b> AG initially ruled that some information could be withheld under the “trade secrets” (552.110) and “agency memoranda” (552.111) exceptions, but said other materials had to be released. The university made   |



a new argument for protecting additional information under the “trade secrets” exception and reasserted its original argument for withholding additional materials under the “agency memoranda” exception. Upon reconsideration, AG accepted both arguments and said some – but not all – of the disputed information could be withheld.

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| Governmental Entity | Reconsideration Open Records # | Factors Behind OVERTURN  |
|---------------------|--------------------------------|--|
| <i>City</i>         |                                |  |
| 1. Amarillo         | OR97-0778                      | <b>Second Bite at the Apple Category 1):</b> AG initially held that the names of complainants and/or witnesses involving a certain law enforcement case should be disclosed. The city asked for reconsideration and did not appear to make a new argument. After reexamining the documents at issue and the statements of the witnesses involved (and noting that previous Open Records Decisions state that names and statements of witnesses <i>may</i> be withheld), the AG concludes that “the city may withhold the identity of the witnesses” under section 552.108 (the “law enforcement” exception) of the Open Records Act.   |
| 2. Amarillo         | OR97-1372                      | <b>Deadline issue (Category 1):</b> AG initially ruled certain information open to the public because the city supposedly failed to submit its request for a ruling within 10 days, as required by the Open Records Act. The city disputed that claim, and the AG replied: “You have provided this office with information sufficient to show that the department timely submitted its request for a decision and timely made its section 552.108 argument” (the “law enforcement” exception).   |
| 3. Arlington        | OR97-1220                      | <b>Second Bite at the Apple (Category 1):</b> AG initially ruled that the city failed to establish that litigation was reasonably anticipated (exception 552.103), and thus could not withhold from disclosure certain documents. Shortly after that ruling, city officials informed the AG that they had received a complaint by an officer claiming reverse discrimination. Based on that new information, the AG reversed its prior decision.   |
| 4. Austin           | OR97-0318                      | <b>Deadline issues (Category 1):</b> AG initially declared the information at issue open to the public because the city supposedly failed to submit its request for a ruling within 10 days, as required by the Open Records Act. The city later submitted a fax transmission sheet indicating that the request had been faxed within the 10-day time limit. The AG then overturned its prior decision.  |
| 5. Austin           | OR97-2102                      | <b>Affected Entity Misses Deadline, then Shows a “Compelling Interest” Against Disclosure (Category 2):</b> AG initially declared certain information open after the city failed to seek an AG decision within the period established by the Open Records Act. (Requested information is presumed to be public when a request for an open records decision is not made within the prescribed period. The presumption of openness can only be overcome by showing that the information is made confidential by another source of law or affects third-party interests. In other words, the entity must demonstrate a “compelling interest” against disclosure.) Following the initial ruling, the state Advisory Commission on Emergency Communications stepped in and claimed that a section of the state Health and Safety Code made the requested information confidential. The AG then overturned its prior decision. |

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| <b>Governmental Entity</b> | <b>Reconsideration Open Records #</b> | <b>Factors Behind OVERTURN</b>   |
|----------------------------|---------------------------------------|--|
| <i>City</i>                |                                       |  |
| 6. Dallas                  | OR97-0849                             | <b>Deadline issues (Category 1):</b> AG initially ruled certain information open to the public because the city supposedly failed to submit its request for a ruling within 10 days, as required by the Open Records Act. The city disputed that claim, and the AG replied: "You have now demonstrated that you did forward copies of the open records request and the records at issue to this office within the required time limits." The AG then reversed its decision.  |
| 7. Dallas                  | OR97-1506                             | <b>Deadline issues (Category 1)</b> AG initially ruled certain information open to the public because the city supposedly failed to submit its request for a ruling within 10 days, as required by the Open Records Act. The city disputed that claim, and the AG replied: "[W]e conclude that the city timely submitted its request for an open records decision." The AG then reversed its ruling.   |
| 8. Fort Worth              | OR97-2034                             | <b>Second Bite at the Apple (Category 1):</b> AG initially held that certain records regarding a police officer should be released. The city police department protested, arguing that the documents at issue were maintained in the department's "internal" personnel file, the contents of which are made confidential by the Local Government Code. (In contrast, the contents of separate "civil service" personnel files maintained by police and fire departments are subject to public review.) The AG responded: "Based upon your assertion that all of the documents at issue . . . are maintained in the department's [internal] file, we agree that the documents are confidential and must be withheld from disclosure." |
| 9. Houston                 | OR97-2199                             | <b>Third Party Makes a New Argument (Category 4):</b> AG initially held that the city could withhold some information regarding a private company, but other information must be released. The company protested and submitted "additional arguments for withholding the remaining information" under the "trade secrets" exception (552.110). The AG accepted the company's argument against disclosure.  |
| 10. Lubbock                | OR97-1468                             | <b>Deadline issues (Category 1):</b> AG initially ruled certain information open to the public because the city supposedly failed to submit additional information to the AG within the period prescribed by the Open Records Act. The city disputed that claim, and the AG replied: "[Y]ou have submitted a copy of a receipt . . . which indicates that a package was delivered from the city to this office" within the 7-day limit. The AG then reversed its decision.   |
| 11. McAllen                | OR97-2716                             | <b>Second Bite at the Apple (Category 1):</b> AG initially held that the section 552.115 of the Open Records Act does not protect from disclosure birth and death records. The city requested reconsideration on behalf of the Department of Health, which contended that section 552.115 excepts from disclosure a birth or death record maintained by the Bureau of Vital Statistics of the Department of Health. "We have reviewed the department's arguments and agree with its interpretation of section 552.115 of the Government Code."   |

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| <b>Governmental Entity</b>                | <b>Reconsideration Open Records #</b> | <b>Factors Behind OVERTURN</b>  |
|---|---------------------------------------|---|
| <b><i>County</i></b>                      |                                       |   |
| 12. Harris                                | OR97-0867                             | <b>Agency Fails to Provide Adequate Backup Initially (Category 2):</b> AG initially ruled that the county constable failed to establish that litigation was reasonably anticipated, and therefore could not withhold information under the “litigation” exception (552.103). The constable then submitted new information, to which the AG replied: “We conclude that the new information submitted to this office establishes the likelihood of litigation involving the constable.”   |
| 13. Liberty                               | OR97-2647                             | <b>Insufficient Information (Category 3):</b> The AG initially held that the district attorney must release a probable cause affidavit filed in a certain case. The DA then explained that “there may have been some miscommunication regarding the original request.” Based on the new information, the AG concluded that the DA may withhold the information at issue.  |
| <b><i>Independent School District</i></b> |                                       |   |
| 14. El Paso                               | OR97-0326                             | <b>Insufficient Information (Category 3):</b> The AG ruled that a videotape must be released to the public. The ruling was based on the assumption that a transcript of the video had already been released. However, school district officials stated that a written report released by the district was not a transcript. The AG then concluded that the district could withhold the video under the “agency memoranda” exception (552.111).  |
| 15. Harlendale                            | OR97-1674                             | <b>Insufficient Information (Category 3):</b> AG initially rejected the school district’s argument that litigation was reasonably anticipated (exception 552.103) and declared that certain information should be released. The AG later reversed itself, stating: “We now conclude that the school district may withhold from the requestor the portions of the requested [information] that relate to the pending litigation . . .”   |
| 16. Pasadena                              | OR97-0644                             | <b>Affected Government Entity Misses Deadline, then Shows a “Compelling Interest” Against Disclosure (Category 2):</b> AG initially declared certain information open to public review when the school district failed to seek an AG decision within the period established by the Open Records Act. (Requested information is presumed to be public when a request for an open records decision is not made within the prescribed period. The presumption of openness can only be overcome by showing that the information is made confidential by another source of law or affects third-party interests. In other words, the entity must demonstrate a “compelling interest” against disclosure.) Following the initial ruling, the district argued that a section of the state Education Code made the requested information confidential. The AG then overturned its prior decision. |
| <b><i>State Agency</i></b>                |                                       |   |
| 17. Banking Dept.                         | OR97-0719                             | <b>Deadline issues (Category 1):</b> AG initially ruled certain information open to the public because the department supposedly failed to submit its request for a ruling within 10 days, as required by the Open Records Act. The department disputed that claim, and the   |

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AG replied: “[T]hat determination was in error. In fact, the department met its statutory deadline for seeking a decision from this office.” The AG then reversed its decision.

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|----------------------------|---------------------------------------|--|
| <i>State Agency</i>        |                                       |  |
| 18. Comptroller            | OR97-1753                             | <b>Agency Fails to Provide Complete Information Initially (Category 2):</b> Following the initial ruling, the comptroller informed the AG of “extenuating circumstances that . . . warrant the withholding of the requested information.” The AG examined the circumstances and concluded that the comptroller could withhold the information under section 552.101 of the Open Records Act.   |
| 19. Health Dept.           | OR97-1381                             | <b>Affected Entity Misses Deadline, then Shows a “Compelling Interest” Against Disclosure (Category 2):</b> AG initially held that the department could not withhold certain information under the “law enforcement” exception (552.108) because it “failed to provide . . . information necessary to substantiate” the claim within the 10-day time limit. The department later submitted a letter from a “Special Agent in the U.S. Department of Health and Human Services asking that “none of the requested information be released during the . . . investigation.” The AG concludes that, “the need of another governmental body to withhold requested information under section 552.108 provides a compelling reason for nondisclosure of the information.”  |
| 20. Insurance Dept.        | OR97-0477                             | <b>Second Bite at the Apple (Category 1):</b> The AG initially held that the department failed to show that certain information could be withheld under the “trade secrets” exception (552.110). In its first request for reconsideration, the department submitted additional arguments to support its contention that the “trade secrets” exception was applicable. However, the AG informed the department that it still lacked sufficient information to consider the additional arguments. Rather than ending the matter there, the AG gave the department yet another opportunity to submit the required information, ultimately concluding that some of “the information is confidential commercial and financial information protected from disclosure under section 552.110 . . .”  |
| 21. Insurance Dept.        | OR97-0550                             | <b>Retroactive Application of a New Law or ORD (Category 2):</b> The based upon ORD 637 (1995), the AG declared certain information open. But when ORD 637 was replaced by ORD 640 (1996), the Department of Insurance had apparently never released this information. The Department now argued that the ruling should be changed to reflect the standards set out in ORD 640. The AG agreed, allowing the documents to be withheld from disclosure.  |
| 22. Insurance Dept.        | OR97-1469                             | <b>Third Party Makes a New Argument (Category 4):</b> This is a second request for reconsideration. AG initially held that portions of an application sought by a requestor were made confidential by the state Insurance Code (meeting the “confidential by law” exception, 552.101). The AG added, however, that in reaching its ruling it made a certain assumption about the documents. If that assumption were not met, the information would not be considered confidential under the Insurance Code. The department wrote back to say that the assumption was incorrect. At that point the AG issued a second ruling which concluded that some of the materials previously deemed confidential would have to be opened to public review. The department then wrote a second letter, in which it forwarded the new arguments of a company that would be affected by the AG’s recent ruling. The company argued that the information was protected from disclosure by the “trade secrets” exception (552.110). The AG agreed, overruling its previous decision. |





| Governmental Entity        | Reconsideration Open Records # | Factors Behind OVERTURN  |
|----------------------------|--------------------------------|--|
| <i>State Agency</i>        |                                |  |
| 23. Insurance Dept.        | OR97-2088                      | <b>Retroactive Application of a new law or ORD (Category 2):</b> The department argued that amendments to the state Ins approved by the 1997 Legislature required it to withhold information that the AG had ruled open earlier in 1997. AG ag “plain language” of the statute mandates that the information not be disclosed.   |
| 24. Parks & Wildlife Dept. | OR97-1405                      | <b>Affected Entity Misses Deadline, then Shows a “Compelling Interest” Against Disclosure (Category 2):</b> The depart asked permission to withhold certain information regarding a sexual harassment complaint under several exceptions: “c privacy” (552.101); “litigation” (552.103); “attorney-client privilege” (552.107); and “agency memoranda” (552.111). T that some information could be withheld under the common-law privacy exception (since third-party interests were affec other exceptions did not apply because the department failed to seek an AG opinion within the 10-day period established Records Act. (Requested information is presumed to be public when a request for an open records decision is not mac prescribed period. The presumption of openness can only be overcome by showing that the information is made cor another source of law or affects third-party interests. In other words, the entity must demonstrate a “compelling inte disclosure.) The AG denied the department’s first request for reconsideration, prompting the department to submit a sec The AG then responded: “[W]e understand that the Office of the Attorney General is representing the department i regarding the sexual harassment complaint and has requested that the department not release the requested records. . therefore withhold the remaining requested records under section 552.103.” |
| 25. Public Safety Dept.    | OR97-2745                      | <b>Affected Entity Misses Deadline, then Shows a “Compelling Interest” Against Disclosure (Category 2):</b> AG initi certain information open to the public after the department failed to submit additional materials that the AG requested with set out in section 552.303 of the Open Records Act. (Requested information is presumed to be public when additio required by the AG are not forwarded in a timely manner. This presumption of openness can only be overcome by show information is made confidential by another source of law or affects third-party interests. In other words, the entity must a “compelling interest” against disclosure.) The department claimed that it never received the request for additional m further, that compelling reasons existed for withholding the requested information under the “law enforcement” exceptio Specifically, a county district attorney’s office (a third party) requested that the information not be released to the publ responded: “The need of another governmental body to withhold requested information . . . provides a compellin nondisclosure of the information.”   |
| 26. Trans-ortation Dept.   | OR97-1121                      | <b>Agency Fails to Provide Adequate Information Initially (Category 2):</b> AG initially ruled that a document held by th was not an audit working paper, and thus could not be withheld from disclosure under exception 552.116. However, the later indicated that the document was prepared by “an auditor with the Office of the State Auditor . . .” Based on that the AG reversed its prior decision.   |

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**Source:** Data compiled from records available at the Texas Attorney General's Office. Table prepared for Senate Interim Committee on Public Information by Consumers Union Southwest Regional Office, Austin, Texas, September 1998.

**TABLE 2: Number of AG Open Record Letter (ORL) Rulings on Requests for Reconsideration (Appeals) from All Governmental Bodies, 1988-98**

|                                   | 1988     | 1989     | 1990     | 1991     | 1992     | 1993     | 1994     | 1995      | 1996      | 1997         | 1998*     |
|-----------------------------------|----------|----------|----------|----------|----------|----------|----------|-----------|-----------|--------------|-----------|
| State Agencies                    | 2        | 2        | 0        | 0        | 0        | 0        | 2        | 16        | 29        | 49           | 18        |
| Cities                            | 2        | 0        | 0        | 0        | 1        | 2        | 4        | 10        | 23        | 37           | 30        |
| Counties                          | 0        | 0        | 0        | 0        | 0        | 0        | 0        | 2         | 10        | 10           | 4         |
| School Districts                  | 0        | 0        | 0        | 0        | 1        | 0        | 1        | 2         | 8         | 8            | 5         |
| Colleges/Universities             | 1        | 0        | 0        | 0        | 0        | 0        | 1        | 1         | 4         | 3            | 3         |
| Judicial Districts                | 0        | 0        | 0        | 0        | 0        | 1        | 0        | 0         | 1         | 0            | 0         |
| Port, River and Water Authorities | 0        | 0        | 0        | 0        | 0        | 0        | 0        | 0         | 4         | 2            | 0         |
| Transit Agencies                  | 0        | 0        | 0        | 0        | 0        | 0        | 0        | 0         | 2         | 1            | 1         |
| Other Governmental Entities       | 0        | 0        | 0        | 0        | 0        | 0        | 0        | 1         | 1         | 0            | 1         |
| <b>TOTAL</b>                      | <b>5</b> | <b>2</b> | <b>0</b> | <b>0</b> | <b>2</b> | <b>3</b> | <b>8</b> | <b>32</b> | <b>82</b> | <b>110**</b> | <b>62</b> |

**Source:** Data provided by the Texas Attorney General’s Office and supplemented by manual review of all reconsideration letters issued during 1997. Table prepared for Senate Interim Committee on Public Information by Consumers Union Southwest Regional Office, Austin, Texas, September 1998.

**Note:** The numbers shown are based *only* on the requests for reconsideration for which the AG issued a ruling. The AG issues rulings only when a government entity requests a reconsideration. The AG does not write open records letters (ORLs) in response to *citizens* who request a reconsideration of a previous ruling.

\* January 1-May 7.

\*\* In reviewing the ORLs for 1997, we determined that 10 of these 110 were actually requests for *clarification*, rather than requests for *reconsideration*. In a request for clarification, the entity does not ask the AG’s office to overturn its previous ruling, but to clarify it. The AG’s office does not distinguish between requests for clarification and reconsideration in its database; therefore it is likely that the totals for 1995, 1996, and 1998 include AG responses to clarifications (we examined the few decisions issued during 1988-94 and determined that they all related to requests for reconsideration). Given that AG reconsideration letters outnumber clarifications 10 to 1 in 1997, we would expect about the same ratio for 1995, 1996, and 1998.

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**TABLE 3: Number of AG Open Record Letter (ORL) Rulings on Requests for Reconsideration  
 (Appeals)  
 from Select State Agencies and the UT System, 1988-98**

|                                      | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998* |
|--------------------------------------|------|------|------|------|------|------|------|------|------|------|-------|
| Dept. of Banking                     | 0    | 0    | 0    | 0    | 0    | 0    | 1    | 0    | 0    | 1    | 1     |
| Comptroller                          | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 1    | 2    | 3    | 2     |
| Education Agency                     | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0     |
| Employee Retirement System           | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0     |
| General Services Commission          | 0    | 1    | 0    | 0    | 0    | 0    | 0    | 1    | 0    | 0    | 0     |
| Dept. of Health                      | 1    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 1    | 3    | 1     |
| Health and Human Services Commission | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 1     |
| Dept. of Housing & Community Affairs | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0     |
| Department of Human Services         | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 2     |
| Dept. of Insurance                   | 0    | 1    | 0    | 0    | 0    | 0    | 0    | 2    | 2    | 13   | 1     |
| Natural Resource Conservation Comm.  | ---  | ---  | ---  | ---  | ---  | 0    | 0    | 0    | 4    | 1    | 1     |
| Air Control Board                    | 0    | 0    | 0    | 0    | 0    | 0    | ---  | ---  | ---  | ---  | ---   |
| Water Commission                     | 0    | 0    | 0    | 0    | 0    | 0    | ---  | ---  | ---  | ---  | ---   |
| Parks and Wildlife Department        | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 3    | 0     |
| Public Utility Comm.                 | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0     |
| Department of Transportation         | 0    | 0    | 0    | 0    | 0    | 0    | 1    | 2    | 6    | 4    | 1     |
| Workforce/<br>Employment Comm.       | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 2    | 0    | 0    | 0     |

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|                                   |          |          |          |          |          |          |          |          |           |           |           |
|-----------------------------------|----------|----------|----------|----------|----------|----------|----------|----------|-----------|-----------|-----------|
| <b>University of Texas System</b> | 0        | 0        | 0        | 0        | 0        | 0        | 1        | 0        | 1         | 0         | 0         |
| <b>TOTAL</b>                      | <b>1</b> | <b>2</b> | <b>0</b> | <b>0</b> | <b>0</b> | <b>0</b> | <b>3</b> | <b>8</b> | <b>16</b> | <b>28</b> | <b>10</b> |

**Source:** Data provided by the Texas Attorney General’s Office and supplemented by manual review of open records letters. Table prepared for Senate Interim Committee on Public Information by Consumers Union Southwest Regional Office, Austin, Texas, September 1998.

**Note:** The numbers shown are based *only* on the requests for reconsideration for which the AG issued a ruling. The AG issues rulings only when a government entity requests a reconsideration. The AG does not write open records letters (ORLs) in response to *citizens* who request a reconsideration of a previous ruling.

\* January 1-May 7.

**TABLE 4: Number of Open Records Requests Referred to AG's Office  
 by Select State Agencies and the UT System, 1988-98**

|                                      | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998* |
|--------------------------------------|------|------|------|------|------|------|------|------|------|------|-------|
| Dept. of Banking                     | 1    | 1    | 5    | 7    | 2    | 19   | 10   | 12   | 3    | 6    | 4     |
| Comptroller                          | 2    | 1    | 3    | 3    | 2    | 10   | 15   | 43   | 27   | 45   | 16    |
| Education Agency                     | 1    | 4    | 5    | 2    | 2    | 4    | 5    | 26   | 13   | 12   | 6     |
| Employee Retirement System           | 0    | 0    | 3    | 0    | 0    | 1    | 3    | 0    | 3    | 10   | 2     |
| General Services Commission          | 2    | 3    | 5    | 1    | 3    | 4    | 5    | 14   | 10   | 3    | 3     |
| Dept. of Health                      | 5    | 3    | 8    | 14   | 10   | 8    | 7    | 26   | 34   | 115  | 43    |
| Health and Human Services Commission | 0    | 0    | 0    | 0    | 0    | 1    | 0    | 1    | 4    | 8    | 4     |
| Dept. of Housing & Community Affairs | 3    | 0    | 1    | 2    | 0    | 0    | 6    | 5    | 3    | 3    | 1     |
| Department of Human Services         | 9    | 4    | 17   | 16   | 13   | 15   | 25   | 15   | 19   | 37   | 10    |
| Dept. of Insurance                   | 16   | 17   | 53   | 52   | 51   | 106  | 81   | 76   | 64   | 111  | 24    |
| Natural Resource Conservation Comm.  | ---  | ---  | ---  | ---  | ---  | 11   | 51   | 59   | 69   | 82   | 16    |
| Air Control Board                    | 2    | 2    | 4    | 2    | 7    | 38   | ---  | ---  | ---  | ---  | ---   |
| Water Commission                     | 3    | 2    | 6    | 6    | 9    | 23   | ---  | ---  | ---  | ---  | ---   |
| Parks and Wildlife Department        | 0    | 2    | 0    | 0    | 3    | 8    | 8    | 26   | 23   | 23   | 1     |
| Public Utility Comm.                 | 0    | 0    | 0    | 2    | 1    | 0    | 0    | 3    | 2    | 3    | 1     |
| Department of Transportation         | 11   | 15   | 30   | 18   | 15   | 29   | 52   | 76   | 101  | 78   | 28    |
| Workforce/<br>Employment Comm.       | 2    | 3    | 5    | 2    | 6    | 0    | 0    | 0    | 7    | 5    | 1     |
| University of Texas                  | 4    | 9    | 7    | 16   | 12   | 16   | 17   | 31   | 30   | 41   | 10    |



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|               |           |           |            |            |            |            |            |            |            |            |            |
|---------------|-----------|-----------|------------|------------|------------|------------|------------|------------|------------|------------|------------|
| <b>System</b> |           |           |            |            |            |            |            |            |            |            |            |
| <b>TOTAL</b>  | <b>61</b> | <b>66</b> | <b>152</b> | <b>143</b> | <b>136</b> | <b>293</b> | <b>285</b> | <b>428</b> | <b>412</b> | <b>582</b> | <b>170</b> |

**Source:** Data compiled by the Texas Attorney General’s Office and supplemented by manual review of open records letters for the 1988-92 period. Table prepared for Senate Interim Committee on Public Information by Consumers Union Southwest Regional Office, Austin, Texas, September 1998.

**Note:** The numbers for 1988-92 may slightly underestimate the total number of open records referrals to the AG by agencies. These figures represent the number of AG *rulings* issued each year (rulings take the form of open record letters [ORLs] -- including AG responses to requests for reconsideration of previous rulings -- and open records decisions [ORDs]). The figures for the latter period represent the number of *requests* for rulings made by governmental entities each year. The AG’s office does not have *request* data for the 1988-92 period. The figures for the Texas Air Control Board and Texas Water Commission in 1993 were compiled from manual review of ORLs by Consumers Union.

\* January 1-March 26.

**TABLE 5: Categorizing the 26 Overturns and 11 Partial Overturns in 1997: Where Does the Problem Lie?**

| Category   | Frequency |
|--|-----------|
| <b>Category 1:</b> Problem Lies with Attorney General’s Office, and Can Be Fixed through Procedural Changes                      | 16        |
| <b>Category 2:</b> Problem Lies with Governmental Entity Requesting Reconsideration, and Can Be Fixed through Procedural Changes | 13        |
| <b>Category 3:</b> Insufficient Information  | 4         |
| <b>Category 4:</b> Third Party takes a Second Bite at the Apple  | 4         |
| <b>Total</b>   | 37        |

**Source:** Data compiled from records available at the Texas Attorney General’s Office. Table prepared for Senate Interim Committee on Public Information by Consumers Union Southwest Regional Office, Austin, Texas, September 1998.

**Notes:** **Category 1** includes situations in which the Attorney General’s Office simply changes its mind and overrules a previous decision following an appeal or mistakenly asserts in an initial ruling that a governmental body missed a deadline. It also includes situations in which the affected entity advances a new argument to persuade the AG to reverse its prior decision. **Category 2** includes situations in which new facts are brought to light following the release of an Open Records Letter or an affected entity misses a deadline and then shows a “compelling interest” against disclosure. It also includes situations in which there was a misunderstanding that seemed preventable on the part of the entity requesting reconsideration. **Category 3** includes those ORLs where Consumers Union could not easily determine the chain of events without further investigation. In **Category 4**, an affected third party initially submitted inadequate information to the AG and later submitted new information or arguments.

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**TABLE 6: AG Decisions to *Partially Overturn* and *Overturn* Prior Rulings Favorable to Public Access in 1997: A Review**

| Governmental Entity                | Reconsideration Open Records # | Factors Behind PARTIAL OVERTURN   |
|------------------------------------|--------------------------------|---|
| <i>City</i>                        |                                |   |
| 1. Austin                          | OR97-2717                      | <b>Third Party Reconsiderations (Category 4):</b> AG initially ruled that city could withhold some sections of an operations manual under the “trade secrets” exception (552.110), but had to release other sections. The affected company argued that certain references in its original brief to the AG “were incorrect” due to “confusion as to which version” of the company’s operations manual was being used by the city. The AG subsequently reversed, in part, its initial decision. |
| 2. Houston                         | OR97-2739                      | <b>Insufficient Information (Category 3):</b> In its initial ruling, the AG thought the city intended to release certain disputed information. In its request for reconsideration, the city stated this was true of only some of the materials at issue. The city claimed that other information was protected from disclosure by the state Health and Safety Code (confidential by law, exception 552.101). The AG agreed.   |
| <i>County</i>                      |                                |   |
| 3. Harris                          | OR97-2289                      | <b>Misunderstanding request (Category 2):</b> This is the second request for reconsideration on the same issue. The county initially misunderstood what kind of information the requestor wanted. Later, county officials realized they did not have the desired information. The AG then partially overruled its prior decisions to note that the county is not required to give out information it does not have or control.  |
| <i>Independent School District</i> |                                |   |
| 4. Texarkana                       | OR97-0251                      | <b>Second Bite at the Apple (Category 1):</b> AG initially ruled that some information can be withheld under the “trade secrets” exception (552.110), but that the remainder must be released. The school district subsequently asked to withhold one additional statement in a document otherwise subject to disclosure. The AG concluded the statement should be withheld.  |
| <i>Port/Water Authority</i>        |                                |   |
| 5. Elmo Water Supply Corporation   | OR97-2636                      | <b>Agency Fails to Provide Adequate Facts Initially (Category 2):</b> AG initially ruled that the corporation could not withhold certain information under the “litigation” exception (552.103). When the AG issued its initial ruling, the corporation notified the AG of “new issues” that arose “regarding anticipated litigation.” AG subsequently reversed, in part, its initial ruling.   |
| 6. Galveston Wharves               | OR97-0373                      | <b>A Second Bite at the Apple (Category 1):</b> AG initially held that certain portions of disputed documents were confidential by law (exception 552.101), but that the remainder should be released. Galveston Wharves subsequently disputed that finding. AG writes  |

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in response: “[Y]ou disagree with our markings. Upon reconsideration, we agree that certain [additional] information should be redacted to protect confidential information that must be withheld from disclosure. We have remarked the documents in question accordingly.”

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| Governmental Entity           | Reconsideration Open Records # | Factors Behind PARTIAL OVERTURN  |
|-------------------------------|--------------------------------|--|
| <i>State Agency</i>           |                                |  |
| 7. Agriculture Dept.          | OR97-2024                      | <b>Affected Entity Misses Deadline, then Shows a “Compelling Interest” Against Disclosure (Category 2):</b> AG initially held that information about two seed companies was open to the public after the department failed to provide copies of the requested information to the AG in a timely manner as required by the Open Records Act. (Requested information is presumed to be public when an entity fails to provide required information within the prescribed period. The presumption of openness can only be overcome by showing that the information is made confidential by another source of law or affects third-party interests. In other words, the entity must demonstrate a “compelling interest” against disclosure.) Following the initial ruling, the department asked the AG to consider a request for reconsideration by one of the affected companies. The company asserted that the information is confidential under the “trade secrets” exception (552.110). The AG agreed. |
| 8. Insurance Dept.            | OR97-1659                      | <b>Second Bite at the Apple (Category 1):</b> AG initially ruled that certain information pertaining to a department investigation of an insurance company could be withheld, but some must be released. In response, the department claimed it should be permitted to withhold more information under the “attorney-client privilege” (552.107) and “agency memoranda” (552.111) exceptions than the AG originally allowed. The AG disagreed and declined to change its original ruling. On a separate issue, the department argued that other information was made confidential by the state Insurance Code and therefore should be withheld (“confidential by law” exception, 552.101). Originally, the department had argued the information was protected by the “informer’s privilege” exception (552.101), but the AG rejected that assertion. The AG accepted the new argument, however, and allowed the department to withhold various materials protected by the statute.                    |
| 9. Insurance Dept.            | OR97-2254                      | <b>Third Party Makes a New Argument (Category 4):</b> In a decision dealing with three companies, the AG ruled that one company did not demonstrate that certain information was protected by the “trade secrets” exception (552.110). The company submitted additional arguments which showed the release of the information “would cause it to suffer substantial competitive harm.” The AG agreed.  |
| <i>Transportation Agency</i>  |                                |  |
| 10. Capital Metro (Austin)    | OR97-2808                      | <b>Second Bite at the Apple (Category 1):</b> AG initially held that some disputed information can be withheld under the “trade secrets” exception (552.110), but that other material must be released. The affected company then argued that part of the disputed information should in fact be withheld. The AG agreed with the company’s additional arguments.  |
| <i>University</i>             |                                |  |
| 11. University of North Texas | OR97-2428                      | <b>Affected Entity Makes a New Argument (Category 1):</b> AG initially ruled that some information could be withheld under the “trade secrets” (552.110) and “agency memoranda” (552.111) exceptions, but said other materials had to be released. The university made   |

a new argument for protecting additional information under the “trade secrets” exception and reasserted its original argument for withholding additional materials under the “agency memoranda” exception. Upon reconsideration, AG accepted both arguments and said some – but not all – of the disputed information could be withheld.

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| Governmental Entity | Reconsideration Open Records # | Factors Behind OVERTURN  |
|---------------------|--------------------------------|--|
| <i>City</i>         |                                |  |
| 1. Amarillo         | OR97-0778                      | <b>Second Bite at the Apple Category 1):</b> AG initially held that the names of complainants and/or witnesses involving a certain law enforcement case should be disclosed. The city asked for reconsideration and did not appear to make a new argument. After reexamining the documents at issue and the statements of the witnesses involved (and noting that previous Open Records Decisions state that names and statements of witnesses <i>may</i> be withheld), the AG concludes that “the city may withhold the identity of the witnesses” under section 552.108 (the “law enforcement” exception) of the Open Records Act.   |
| 2. Amarillo         | OR97-1372                      | <b>Deadline issue (Category 1):</b> AG initially ruled certain information open to the public because the city supposedly failed to submit its request for a ruling within 10 days, as required by the Open Records Act. The city disputed that claim, and the AG replied: “You have provided this office with information sufficient to show that the department timely submitted its request for a decision and timely made its section 552.108 argument” (the “law enforcement” exception).   |
| 3. Arlington        | OR97-1220                      | <b>Second Bite at the Apple (Category 1):</b> AG initially ruled that the city failed to establish that litigation was reasonably anticipated (exception 552.103), and thus could not withhold from disclosure certain documents. Shortly after that ruling, city officials informed the AG that they had received a complaint by an officer claiming reverse discrimination. Based on that new information, the AG reversed its prior decision.   |
| 4. Austin           | OR97-0318                      | <b>Deadline issues (Category 1):</b> AG initially declared the information at issue open to the public because the city supposedly failed to submit its request for a ruling within 10 days, as required by the Open Records Act. The city later submitted a fax transmission sheet indicating that the request had been faxed within the 10-day time limit. The AG then overturned its prior decision.  |
| 5. Austin           | OR97-2102                      | <b>Affected Entity Misses Deadline, then Shows a “Compelling Interest” Against Disclosure (Category 2):</b> AG initially declared certain information open after the city failed to seek an AG decision within the period established by the Open Records Act. (Requested information is presumed to be public when a request for an open records decision is not made within the prescribed period. The presumption of openness can only be overcome by showing that the information is made confidential by another source of law or affects third-party interests. In other words, the entity must demonstrate a “compelling interest” against disclosure.) Following the initial ruling, the state Advisory Commission on Emergency Communications stepped in and claimed that a section of the state Health and Safety Code made the requested information confidential. The AG then overturned its prior decision. |



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| <b>Governmental Entity</b> | <b>Reconsideration Open Records #</b> | <b>Factors Behind OVERTURN</b>   |
|----------------------------|---------------------------------------|--|
| <i>City</i>                |                                       |  |
| 6. Dallas                  | OR97-0849                             | <b>Deadline issues (Category 1):</b> AG initially ruled certain information open to the public because the city supposedly failed to submit its request for a ruling within 10 days, as required by the Open Records Act. The city disputed that claim, and the AG replied: "You have now demonstrated that you did forward copies of the open records request and the records at issue to this office within the required time limits." The AG then reversed its decision.  |
| 7. Dallas                  | OR97-1506                             | <b>Deadline issues (Category 1)</b> AG initially ruled certain information open to the public because the city supposedly failed to submit its request for a ruling within 10 days, as required by the Open Records Act. The city disputed that claim, and the AG replied: "[W]e conclude that the city timely submitted its request for an open records decision." The AG then reversed its ruling.   |
| 8. Fort Worth              | OR97-2034                             | <b>Second Bite at the Apple (Category 1):</b> AG initially held that certain records regarding a police officer should be released. The city police department protested, arguing that the documents at issue were maintained in the department's "internal" personnel file, the contents of which are made confidential by the Local Government Code. (In contrast, the contents of separate "civil service" personnel files maintained by police and fire departments are subject to public review.) The AG responded: "Based upon your assertion that all of the documents at issue . . . are maintained in the department's [internal] file, we agree that the documents are confidential and must be withheld from disclosure." |
| 9. Houston                 | OR97-2199                             | <b>Third Party Makes a New Argument (Category 4):</b> AG initially held that the city could withhold some information regarding a private company, but other information must be released. The company protested and submitted "additional arguments for withholding the remaining information" under the "trade secrets" exception (552.110). The AG accepted the company's argument against disclosure.  |
| 10. Lubbock                | OR97-1468                             | <b>Deadline issues (Category 1):</b> AG initially ruled certain information open to the public because the city supposedly failed to submit additional information to the AG within the period prescribed by the Open Records Act. The city disputed that claim, and the AG replied: "[Y]ou have submitted a copy of a receipt . . . which indicates that a package was delivered from the city to this office" within the 7-day limit. The AG then reversed its decision.   |
| 11. McAllen                | OR97-2716                             | <b>Second Bite at the Apple (Category 1):</b> AG initially held that the section 552.115 of the Open Records Act does not protect from disclosure birth and death records. The city requested reconsideration on behalf of the Department of Health, which contended that section 552.115 exempts from disclosure a birth or death record maintained by the Bureau of Vital Statistics of the Department of Health. "We have reviewed the department's arguments and agree with its interpretation of section 552.115 of the Government Code."   |

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| <b>Governmental Entity</b>                | <b>Reconsideration Open Records #</b> | <b>Factors Behind OVERTURN</b>  |
|---|---------------------------------------|---|
| <b><i>County</i></b>                      |                                       |   |
| 12. Harris                                | OR97-0867                             | <b>Agency Fails to Provide Adequate Backup Initially (Category 2):</b> AG initially ruled that the county constable failed to establish that litigation was reasonably anticipated, and therefore could not withhold information under the “litigation” exception (552.103). The constable then submitted new information, to which the AG replied: “We conclude that the new information submitted to this office establishes the likelihood of litigation involving the constable.”   |
| 13. Liberty                               | OR97-2647                             | <b>Insufficient Information (Category 3):</b> The AG initially held that the district attorney must release a probable cause affidavit filed in a certain case. The DA then explained that “there may have been some miscommunication regarding the original request.” Based on the new information, the AG concluded that the DA may withhold the information at issue.  |
| <b><i>Independent School District</i></b> |                                       |   |
| 14. El Paso                               | OR97-0326                             | <b>Insufficient Information (Category 3):</b> The AG ruled that a videotape must be released to the public. The ruling was based on the assumption that a transcript of the video had already been released. However, school district officials stated that a written report released by the district was not a transcript. The AG then concluded that the district could withhold the video under the “agency memoranda” exception (552.111).  |
| 15. Harlendale                            | OR97-1674                             | <b>Insufficient Information (Category 3):</b> AG initially rejected the school district’s argument that litigation was reasonably anticipated (exception 552.103) and declared that certain information should be released. The AG later reversed itself, stating: “We now conclude that the school district may withhold from the requestor the portions of the requested [information] that relate to the pending litigation . . .”   |
| 16. Pasadena                              | OR97-0644                             | <b>Affected Government Entity Misses Deadline, then Shows a “Compelling Interest” Against Disclosure (Category 2):</b> AG initially declared certain information open to public review when the school district failed to seek an AG decision within the period established by the Open Records Act. (Requested information is presumed to be public when a request for an open records decision is not made within the prescribed period. The presumption of openness can only be overcome by showing that the information is made confidential by another source of law or affects third-party interests. In other words, the entity must demonstrate a “compelling interest” against disclosure.) Following the initial ruling, the district argued that a section of the state Education Code made the requested information confidential. The AG then overturned its prior decision. |
| <b><i>State Agency</i></b>                |                                       |   |
| 17. Banking Dept.                         | OR97-0719                             | <b>Deadline issues (Category 1):</b> AG initially ruled certain information open to the public because the department supposedly failed to submit its request for a ruling within 10 days, as required by the Open Records Act. The department disputed that claim, and the   |

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AG replied: “[T]hat determination was in error. In fact, the department met its statutory deadline for seeking a decision from this office.” The AG then reversed its decision.

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| <b>Governmental Entity</b> | <b>Reconsideration Open Records #</b> | <b>Factors Behind OVERTURN</b>   |
|----------------------------|---------------------------------------|--|
| <i>State Agency</i>        |                                       |  |
| 18. Comp-troller           | OR97-1753                             | <b>Agency Fails to Provide Complete Information Initially (Category 2):</b> Following the initial ruling, the comptroller informed the AG of “extenuating circumstances that . . . warrant the withholding of the requested information.” The AG examined the circumstances and concluded that the comptroller could withhold the information under section 552.101 of the Open Records Act.   |
| 19. Health Dept.           | OR97-1381                             | <b>Affected Entity Misses Deadline, then Shows a “Compelling Interest” Against Disclosure (Category 2):</b> AG initially held that the department could not withhold certain information under the “law enforcement” exception (552.108) because it “failed to provide . . . information necessary to substantiate” the claim within the 10-day time limit. The department later submitted a letter from a “Special Agent in the U.S. Department of Health and Human Services asking that “none of the requested information be released during the . . . investigation.” The AG concludes that, “the need of another governmental body to withhold requested information under section 552.108 provides a compelling reason for nondisclosure of the information.”  |
| 20. Insurance Dept.        | OR97-0477                             | <b>Second Bite at the Apple (Category 1):</b> The AG initially held that the department failed to show that certain information could be withheld under the “trade secrets” exception (552.110). In its first request for reconsideration, the department submitted additional arguments to support its contention that the “trade secrets” exception was applicable. However, the AG informed the department that it still lacked sufficient information to consider the additional arguments. Rather than ending the matter there, the AG gave the department yet another opportunity to submit the required information, ultimately concluding that some of “the information is confidential commercial and financial information protected from disclosure under section 552.110 . . .”  |
| 21. Insurance Dept.        | OR97-0550                             | <b>Retroactive Application of a New Law or ORD (Category 2):</b> The based upon ORD 637 (1995), the AG declared certain information open. But when ORD 637 was replaced by ORD 640 (1996), the Department of Insurance had apparently never released this information. The Department now argued that the ruling should be changed to reflect the standards set out in ORD 640. The AG agreed, allowing the documents to be withheld from disclosure.  |
| 22. Insurance Dept.        | OR97-1469                             | <b>Third Party Makes a New Argument (Category 4):</b> This is a second request for reconsideration. AG initially held that portions of an application sought by a requestor were made confidential by the state Insurance Code (meeting the “confidential by law” exception, 552.101). The AG added, however, that in reaching its ruling it made a certain assumption about the documents. If that assumption were not met, the information would not be considered confidential under the Insurance Code. The department wrote back to say that the assumption was incorrect. At that point the AG issued a second ruling which concluded that some of the materials previously deemed confidential would have to be opened to public review. The department then wrote a second letter, in which it forwarded the new arguments of a company that would be affected by the AG’s recent ruling. The company argued that the information was protected from disclosure by the “trade secrets” exception (552.110). The AG agreed, overruling its previous decision. |



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| <b>Governmental Entity</b> | <b>Reconsideration Open Records #</b> | <b>Factors Behind OVERTURN</b>   |
|----------------------------|---------------------------------------|--|
| <i>State Agency</i>        |                                       |  |
| 23. Insurance Dept.        | OR97-2088                             | <b>Retroactive Application of a new law or ORD (Category 2):</b> The department argued that amendments to the state Insurance Code approved by the 1997 Legislature required it to withhold information that the AG had ruled open earlier in 1997. AG agreed that the “plain language” of the statute mandates that the information not be disclosed.   |
| 24. Parks & Wildlife Dept. | OR97-1405                             | <b>Affected Entity Misses Deadline, then Shows a “Compelling Interest” Against Disclosure (Category 2):</b> The department initially asked permission to withhold certain information regarding a sexual harassment complaint under several exceptions: “common-law privacy” (552.101); “litigation” (552.103); “attorney-client privilege” (552.107); and “agency memoranda” (552.111). The AG ruled that some information could be withheld under the common-law privacy exception (since third-party interests were affected), but the other exceptions did not apply because the department failed to seek an AG opinion within the 10-day period established by the Open Records Act. (Requested information is presumed to be public when a request for an open records decision is not made within the prescribed period. The presumption of openness can only be overcome by showing that the information is made confidential by another source of law or affects third-party interests. In other words, the entity must demonstrate a “compelling interest” against disclosure.) The AG denied the department’s first request for reconsideration, prompting the department to submit a second request. The AG then responded: “[W]e understand that the Office of the Attorney General is representing the department in litigation regarding the sexual harassment complaint and has requested that the department not release the requested records. . . . You may therefore withhold the remaining requested records under section 552.103.” |
| 25. Public Safety Dept.    | OR97-2745                             | <b>Affected Entity Misses Deadline, then Shows a “Compelling Interest” Against Disclosure (Category 2):</b> AG initially declared certain information open to the public after the department failed to submit additional materials that the AG requested within the period set out in section 552.303 of the Open Records Act. (Requested information is presumed to be public when additional materials required by the AG are not forwarded in a timely manner. This presumption of openness can only be overcome by showing that the information is made confidential by another source of law or affects third-party interests. In other words, the entity must demonstrate a “compelling interest” against disclosure.) The department claimed that it never received the request for additional materials and, further, that compelling reasons existed for withholding the requested information under the “law enforcement” exception (552.108). Specifically, a county district attorney’s office (a third party) requested that the information not be released to the public. The AG responded: “The need of another governmental body to withhold requested information . . . provides a compelling reason for nondisclosure of the information.”   |
| 26. Transportation Dept.   | OR97-1121                             | <b>Agency Fails to Provide Adequate Information Initially (Category 2):</b> AG initially ruled that a document held by the department was not an audit working paper, and thus could not be withheld from disclosure under exception 552.116. However, the department later indicated that the document was prepared by “an auditor with the Office of the State Auditor . . .” Based on that information,   |



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the AG reversed its prior decision.

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**Source:** Data compiled from records available at the Texas Attorney General's Office. Table prepared for Senate Interim Committee on Public Information by Consumers Union Southwest Regional Office, Austin, Texas, September 1998.