

January 6, 1999

Ms. Cynthia Villarreal-Reyna
General Counsel
Texas State Board of Pharmacy
P.O. Box 21
Austin, Texas 78701-3942

OR99-0009



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Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID # 120755.

The State Board of Pharmacy (the "board") received a request for five categories of information pertaining to the adoption of an amendment to section 309.3 of the board's rules concerning the substitution of narrow therapeutic index drugs. You indicate that you have released 312 documents to the requestor. You argue, however, that some of the responsive information is excepted from disclosure by sections 552.101, 552.103, 552.107, 552.110, and 552.111 of the Government Code. You have submitted the documents you seek to withhold as Exhibits A - E.

Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The board has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The board must meet both prongs of this test for information to be excepted under 552.103(a).

You explain that the board is currently involved in litigation. You have provided a copy of the original petition in that lawsuit. *Barr Laboratories v. State Board of Pharmacy*, No. 98-10363 (98th Dist. Ct., Travis County, Tex., Sept. 15, 1998). You have shown that litigation is pending. You seek to withhold Exhibits A, communications prepared by legal counsel (consisting of memoranda), Exhibit B, communications with the Office of the Attorney General (consisting of electronic mail messages and facsimiles), Exhibit C, communications from agency staff with legal counsel (consisting of electronic mail messages), Exhibit D, communications from agency staff (consisting of memoranda and notes), and Exhibit E, computer data under section 552.103, because the information relates to the pending suit. The pending litigation involves the enforcement of the board's rule governing narrow therapeutic index drugs. You have aptly explained and shown how and why the submitted information relates to the narrow therapeutic index rule and the pending litigation. *Texas Legal Found.*, 958 S.W.2d at 483. After reviewing the submitted information and your relevant arguments, we find that you may withhold Exhibits A - E under section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Because we make a determination under section 552.103, we do not address your additional arguments against disclosure. We are resolving this matter with an

informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB\nc

Ref: ID # 120755

Enclosures: Submitted documents

cc: Ms. Pam Horne
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(w/o enclosures)