



October 18, 2002

Mr. Michael Greenberg
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2002-5908

Dear Mr. Greenberg:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170898.

The Texas Department of Health (the “department”) received a request for any information concerning Mark Nutritionals, Inc. (a/k/a Body Solutions), to include any investigative records. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

We first note that the submitted information includes completed reports, which we have marked, that normally must be released pursuant to section 552.022(a)(1) of the Government Code. Section 552.022 makes “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” public information unless expressly made confidential under other law or “except as provided by [s]ection 552.108[.]” Gov’t Code § 552.022(a)(1). Section 552.103 is a discretionary exception under the Public Information Act and is, therefore, not “other law” that makes the completed reports confidential. *See* Open Records Decision Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body’s position in litigation and does not itself make information confidential); 522 at 4 (1989) (discretionary exceptions in general). Therefore, you may not withhold the completed reports from disclosure under section 552.103 of the Government Code. As you raise no other exception to the disclosure of the submitted information, the completed reports must be released to the requestor.

We now address your claim under section 552.103 with respect to the remaining information. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body received the request for information, 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 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). You represent and provide documentation showing that, prior to the department's receipt of the records request, the department requested that the Litigation Division of the Office of the Attorney General seek injunctive relief and civil penalties against Mark Pharmaceutical, Inc., which manufactures and distributes certain products under the name "Body Solutions," for violations of chapter 431 of the Health and Safety Code. Based on your arguments and our review of the submitted information, we conclude that you have shown that litigation was reasonably anticipated on the date the department received the present request for information and that the requested information relates to the anticipated litigation.

However, we note that the potential opposing party in the anticipated litigation has had access to some of the submitted documents. When the opposing party in the litigation has obtained information through discovery or otherwise, no section 552.103(a) interest exists

with respect to that information, and it must be released. Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, you must release the information to which the potential opposing party has had access. The remaining information that is not subject to section 552.022 may be withheld under section 552.103.¹

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

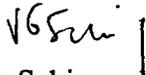
Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

¹ We note that 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).

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/KAB/seg

Ref: ID# 170898

Enc. Submitted documents

c: Mr. Scott J. Slavick
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(w/o enclosures)