ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 30, 2006

Mr. James G. Nolan
Open Records Attorney
Texas Comptroller of Public Accounts
Open Records Division
P. O. Box 13528
Austin, Texas 78711-3528

OR2006-03182

Dear Mr. Nolan:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 245283.

The Comptroller of Public Accounts (the "comptroller") received a request for six categories of information pertaining to the comptroller's determination to assess franchise and sales taxes against Colonial Surgical Supply, Inc. ("Colonial"). You state that the comptroller has released some responsive information but claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.116 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

---

[1]Although you also raise sections 552.108 and 552.137 of the Government Code, you have provided no arguments in support of withholding information under these sections. We therefore assume the comptroller is not claiming these exceptions. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Also, although we have received correspondence from the requestor stating that she will submit arguments to this office in support of releasing the requested documents, as of today, this office has not received any further correspondence from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

[2]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.103 of the Government Code provides in relevant part 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 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 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 was 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. *Univ. of Tex. Law Sch. v. Tex. 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). We note that contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

You inform us that the submitted information relates to two administrative cases being conducted under the APA involving the comptroller and Colonial. You represent that both cases were pending on the date that the comptroller received the instant request for information. Upon review, we agree that this information is related to the pending litigation. As such, we conclude the comptroller may generally withhold the submitted information under section 552.103 of the Government Code.

We note, however, that some of the submitted information appears to have already been seen by Colonial. As you correctly note, 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, the submitted 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 this information must be disclosed. Otherwise, the comptroller may withhold under

section 552.103 the remaining submitted information that has not been seen by Colonial.[3] We also note that the applicability of section 552.103(a) ends once litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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 ten 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. Dep't of Pub. 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 complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

---

[3]As we reach this conclusion, we need not address your remaining arguments against disclosure since none of the information for which you claim sections 552.101, 552.107, 552.111, and 552.116 appears to have been seen by the opposing party to the litigation.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,

Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 245283

Enc. Submitted documents

c: Ms. Phyllis J. Shambaugh
Jones Day
P. O. Box 165017
Columbus, Ohio 43216-5017
(w/o enclosures)