



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 26, 2008

Mr. Carey E. Smith  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2008-11797

Dear Mr. Smith:

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# 320259.

The Texas Health and Human Services Commission (the "commission") received a request for the following four items of information: 1) all correspondence related to the Children's Medication Algorithm Project ("CMAP") sent or received by the commission in the last year; 2) all draft or final copies of the CMAP protocol; 3) a report detailing how much the state spends annually on psychiatric drugs for children in CPS conservatorship, broken down by psychiatric drug; and 4) a list of those entities that have contributed to creating the CMAP protocol, broken down by donor and amount. You state that you have released information responsive to item three. You also state that there is no information responsive to items two and four of the request.<sup>1</sup> You claim that information responsive to item one of the request is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the

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<sup>1</sup>The Act does not require a governmental body to disclose information that did not exist when a request for information was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Section 552.103 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 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 sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. See *Univ. of Tex. Law Sch. v. Tex. 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.); see also 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.

You state, and provide documentation showing, that prior to the commission's receipt of this request a *qui tam* lawsuit styled *The State of Texas ex. rel. Allen Jones v. Janssen, L.P., Janssen Pharmaceutical, Inc., Ortho-McNeil Pharmaceutical, Inc., McNeil Consumer & Specialty Pharmaceuticals, Janssen-Ortho, LLC, and Johnson & Johnson, Inc.*, Cause No. GV-401288 was filed under seal in the 250<sup>th</sup> Judicial District Court of Travis County, Texas and served upon the Texas Attorney General. You inform us that the lawsuit sought to obtain relief under the Texas Medicaid Fraud Prevention Act. You inform us that the

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<sup>2</sup>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.

allegations included improper marketing by the defendants through several vehicles including CMAP, the Texas Medication Algorithm Project, and the Texas Implementation of Medication Algorithms. You state that in the course of its representation of the State of Texas as a plaintiff in the ongoing lawsuit, the Office of the Attorney General represents the commission and the state agencies under its organizational umbrella that have direct involvement in the programs at issue in this lawsuit. Based on these representations, and our review of the information at issue, we conclude that the information at issue it is related to the pending litigation for purposes of section 552.103. Accordingly, the commission may withhold the information at issue under section 552.103 of the Government Code.<sup>3</sup>

We note, however, that once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any submitted information that has either been obtained from or provided to all other parties in the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

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 challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas 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.

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 10 calendar days of the date of this ruling.

Sincerely,



Benjamin A. Diener  
Assistant Attorney General  
Open Records Division

BAD/jb

Ref: ID# 320259

Enc. Submitted documents

c: Ms. Emily Ramshaw  
Reporter, Austin Bureau  
The Dallas Morning News  
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(w/o enclosures)