



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 22, 2009

Mr. Walter Ehresman  
Assistant General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2009-15042

Dear Mr. Ehresman:

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#359090.

The Department of State Health Services (the "department") received a request for four categories of information concerning the Newborn Screening Program. You state that you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103 and 552.107 of the Government Code. You state that a portion of the information at issue may implicate the proprietary interests of a third party. You state, and have provided documentation showing, that you notified the third party, Bio-Rad Laboratories ("Bio-Rad"), of the request and of its opportunity to submit comments to this office as to why the information at issue should not be released to the requestor. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances).* We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

Initially, you inform us, and the submitted information reflects, that requestor agreed to exclude employee personal information and e-mail addresses from her request. Therefore, any such information is not responsive to the request and we do not address such information in this ruling.

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<sup>1</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.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has not received any correspondence from Bio-Rad. Thus, we have no basis to conclude the release of any portion of the submitted information would implicate Bio-Rad's proprietary interest. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). Accordingly, the department may not withhold any portion of the submitted information on the basis of any proprietary interest Bio-Rad may have in the information.

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 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 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 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).

You state, and provide documentation showing, that prior to the department's receipt of this request, a lawsuit in which the department is a party was filed and is currently pending in United States District Court; Western Division of Texas; San Antonio Division. Accordingly, we find that litigation was pending when the department received this request for information. Furthermore, you explain the requested records relate directly to the lawsuit.

Based on these representations and our review, we agree the submitted information relates to the pending litigation. Therefore, section 552.103 is generally applicable to the submitted information.

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has obtained or otherwise been given access to the information then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note that some of the information you seek to withhold from disclosure under section 552.103 is publicly available on the department's website. If information has been voluntarily released to any member of the public, then the same information may not be subsequently withheld from the public, unless its public disclosure is expressly prohibited by law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). 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). Thus, except for any information obtained from or provided to the opposing party in the litigation and the information the department has made publicly available on its website, which we have marked, the department may withhold the submitted information under section 552.103 of the Government Code.<sup>2</sup>

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jonathan Miles

Assistant Attorney General  
Open Records Division

JM/cc

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<sup>2</sup> As our ruling is dispositive, we need not address your remaining arguments for the submitted information.

Mr. Walter Ehresman - Page 4

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Enc. Submitted documents

c: Requestor  
(w/o enclosures)