



October 12, 2001

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

OR2001-4634

Dear Mr. Greenburg:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153218.

The Texas Department of Health (the "department") received a request for the department's file on N.V.E. Pharmaceutical, Inc. ("N.V.E.") and their product. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(10) a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency;

The submitted information contains administrative rules adopted by the department that are subject to section 552.022(a)(10). These rules, which we have marked, must be released unless they are confidential under other law. You assert that the rules are excepted from

disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception and is not "other law" for the purpose of section 552.022. Open Records Decision No. 665 at 2 n.5 (2000) (governmental body may waive section 552.103). Consequently, you must release the marked administrative rules.

With respect to the remainder of the submitted information, we address your argument under section 552.103 of the Government Code. 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.

The governmental body asserting section 552.103 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 governmental body must meet both prongs of this test for information to be excepted under 552.103(a). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.*

You indicate that the department has investigated N.V.E. for misbranding dietary supplements distributed into the State of Texas and that you have referred this investigation to the Office of the Attorney General's Consumer Protection Division for possible civil penalties and injunctive relief. See Health & Safety Code § 431.0585. You contend that litigation is now reasonably anticipated concerning N.V.E. and its products. According to your brief, the attorney general's office seeks to withhold the requested information based on its litigation interest. You have submitted correspondence from a representative of the Consumer Protection Division, who states that while the attorney general's office has not sued N.V.E., it is preparing to file suit in the event that the parties do not reach a settlement.

See generally Open Records Decision No. 469 (1987). The Consumer Protection Division representative likewise indicates that the attorney general's office is investigating and preparing to take legal action against some of the wholesalers of N.V.E.'s products. Based on the attorney general's arguments and our review of the submitted information, we agree that the submitted information relates to reasonably anticipated litigation. Furthermore, while the department has not established that it is a party to this litigation, we conclude that section 552.103 is applicable in this instance because the attorney general's office, which will be a party to the anticipated litigation, has asserted its litigation interest in the requested information. *See* Open Records Decision Nos. 469 (1987) (university may withhold material related to possible criminal litigation that was furnished to the district attorney), 141 (1976) (predecessor provision of section 552.103 applies to travel records of State Auditor to protect district attorney's litigation interests), 121 (1976) (university may withhold information under litigation exception if district attorney determines information should not be released); *cf.* Open Records Decision No. 586 (1991) (need of another governmental body may be compelling reason for non-disclosure of requested information), *but see* Open Records Decision Nos. 392 (1983) (where litigation involves private individual and private company, exception not applicable to information collected during investigation by Consumer Credit Commissioner), 132 (1976) (exception not applicable where school district not a party to litigation). Therefore, with the exception of the information that is subject to release under section 552.022, you may withhold the submitted information under section 552.103 of the Government Code.¹

We note, however, that 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 anticipated 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).

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

¹Based on this finding, we need not reach the remainder of your arguments.

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).

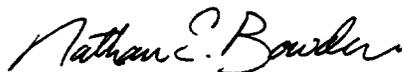
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dept. 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 complaints about over-charging must be directed to Hadassah Schloss at the General Services 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. 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 153218

Enc: Submitted documents

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