



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 7, 2010

Ms. Linda S. Wiegman  
Deputy General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2010-04895

Dear Ms. Wiegman:

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# 375122.

The Texas Department of State Health Services (the "department") received a request for the following four categories of information: (1) contracts, agreements, or payments related to the Texas Medication Algorithm Project ("TMAP"), the Texas Implementation of Medication Algorithms ("TIMA"), and the Children's Medication Algorithm Project ("CMAP"); (2) documents related to the decision to move forward with CMAP; (3) documents related to the inclusion of the Vagus Nerve Stimulator in the Major Depressive Disorder ("MDD") Algorithm; and (4) records related to other guidelines approved for use in lieu of TMAP, TIMA, or CMAP. You state the department has provided or will provide some of the requested information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative samples of information.<sup>2</sup>

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<sup>1</sup>Although you also raise section 552.101 of the Government Code as an exception to disclosure of the requested information, you have provided no arguments regarding the applicability of this section; we therefore assume that you no longer urge section 552.101. *See* Gov't Code §§ 552.301(b), (e), .302.

<sup>2</sup>We assume that the representative samples of records submitted to this office are 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

You contend the submitted information is protected under section 552.103 of the Government Code, which provides:

(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 the department received the request for information after a 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 in the District Court of Travis County, Texas, 250th Judicial District. Based on your representation and our review, we conclude litigation involving the department was pending when the department received the request. You also state the submitted e-mails, drafts, notes, and memoranda are related to the pending litigation, which involves issues related to the TMAP, CMAP, and TIMA. Based on your representations and our review, we find the submitted information is related to the pending litigation for the purposes of section 552.103. We therefore conclude the

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to the extent that those records contain substantially different types of information than that submitted to this office.

department may withhold the submitted information under section 552.103 of the Government Code.<sup>3</sup>

However, we note, and you acknowledge, 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 information at issue that has either been obtained from or provided to all opposing 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 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,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 375122

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining raised exceptions to disclosure.