



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 22, 2011

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

OR2011-10529

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# 425114 (CPA ORTS # 7204110185, 7204146243, 7204116519, 7204120082, 7204128672, 7204098246, 7204101494).

The Texas Comptroller of Public Accounts (the "comptroller") received seven requests for multiple categories of information pertaining to two named individuals, sampling procedure manuals, audit procedure manuals, specified audit procedures, and information pertaining to a named company.<sup>1</sup> You state some of the requested information no longer exists.<sup>2</sup> You inform us the comptroller has disposed of some of the requested information in accordance with previous determinations issued to the comptroller. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001). You also state you have released some of the requested information. You further state you have redacted social security numbers pursuant to section 552.147 of the Government Code.<sup>3</sup> You claim that the submitted information is

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<sup>1</sup>You inform us the requestor has withdrawn portions of two of the requests.

<sup>2</sup>The Act does not require a governmental body to release information that did not exist when it received a request or to create information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>3</sup>Section 552.147 of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. Gov't Code § 552.147(b).

excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.136 of the Government Code.<sup>4</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>5</sup>

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). The comptroller has the burden of providing relevant facts and documents to show the section 552.103 exception is applicable in a particular situation. The test for meeting this burden is a showing (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). The comptroller must meet both prongs of this test for information to be excepted under section 552.103. We note contested cases conducted under the Texas 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 state, and provide documentation showing, on the date the comptroller received the present requests for information, the comptroller was a party to contested administrative proceedings conducted under the APA involving the requestor's client, the named company.

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<sup>4</sup>Although you also raise sections 552.108, 552.111, and 552.116 of the Government Code, you have not provided any arguments to support these exceptions. Therefore, we assume you have withdrawn your claim that these sections apply to the submitted information. See Gov't Code §§ 552.301, .302.

<sup>5</sup>We assume the "representative sample" of information 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 those records contain substantially different types of information than those submitted to this office.

We therefore agree litigation to which the comptroller is a party was pending on the date the comptroller received the requests. We further find the information at issue relates to the pending litigation. Accordingly, based on your representations and our review, we conclude the submitted information may be withheld under section 552.103 of the Government Code.<sup>6</sup>

We note, however, 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the 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,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/eb

Ref: ID# 425114

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>6</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.