



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 20, 2012

Ms. Ruth H. Soucy
Deputy General Counsel for Open Records
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2012-00985

Dear Ms. Soucy:

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# 442811 (Comptroller ID# 7713929825).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for five categories of information pertaining to prepaid wireless providers. You state the comptroller will provide some of the requested information to the requestor. You also inform us that to the extent the request seeks audit working papers and Audit Work Manager comments subject to section 552.116 of the Government Code, the comptroller is withholding this information pursuant to the previous determinations issued to the comptroller in Open Records Letter Nos. 2007-10491 (2007) and 2004-3926 (2004), respectively. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). You claim the remaining requested information is excepted from disclosure under sections 552.103,

552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative samples of information.² We have also considered comments submitted by an attorney representing Alltell Communications, Inc., Dallas MTA, L.P., and GTE Mobilnet of the Southwest. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you state a portion of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-16824 (2010). In that ruling, we determined the comptroller may withhold the information at issue pursuant to section 552.103 of the Government Code. You state the law, facts, and circumstances on which the prior ruling was based have not changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the comptroller may rely on Open Records Letter No. 2010-16824 as a previous determination and withhold the identical information in accordance with this ruling. *See* ORD 673 at 7-8. We will address the arguments against disclosure of the submitted 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.

¹Although you initially also raised sections 552.101 and 552.108 of the Government Code as exceptions to disclosure, you did not submit to this office written comments stating the reasons why these sections would except any of this information, nor have you identified any information you seek to withhold under these exceptions; we therefore assume you no longer assert these exceptions. *See* Gov't Code §§ 552.301, .302.

²We assume 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 those records contain substantially different types of information than that submitted to this office.

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 inform us, and provide documentation showing, that on the date the comptroller received the present request for information, the comptroller was a party to contested administrative proceedings conducted under the APA. You state these proceedings are abated until there is a final ruling regarding the decision in *Commission on State Emergency Communications v. TracFone Wireless, Inc.*, 343 S.W.3d 233 (Tex. App.—Austin 2011), which is the subject of a petition for review pending with the Supreme Court of Texas (Case No. 11-0473). We therefore agree litigation to which the comptroller is a party was pending on the date the comptroller received the request. We further find the submitted information 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.³

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, or call the Office of the Attorney General's Open Government Hotline, toll free,

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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,

A handwritten signature in black ink, appearing to read 'KLC', with a long horizontal flourish extending to the right.

Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/agn

Ref: ID# 442811

Enc. Submitted documents

c: Requestor
(w/o enclosures)