



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 2, 2012

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

OR2012-10154

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# 457737 (CPA ID# 8177202181).

The Texas Comptroller of Public Accounts (the "comptroller's office") received a request for four categories of information related to request for proposals number 946M1. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup> We have also received and considered comments from the Office of the Attorney General (the "OAG"). *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note a portion of the submitted information, which we have marked, may subject to a previous determination issued by this office in Open Records Letter No. 2010-17409 (2010). In that ruling, this office ruled, in part, that the comptroller's office must release Citibank's submitted proposal response and executed contract related to request for proposals number 946A1. As we have no indication that the law, facts, or circumstances on which this prior ruling was based have changed, to the extent the marked information is identical to the information previously requested and ruled upon by this office, the comptroller's office must continue to rely on this ruling as previous determination and withhold or release any

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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.

previously ruled upon information in accordance with this prior ruling. *See* Open Records Decision No. 673 (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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the information we have marked is not encompassed by the previous decision, we will address your arguments against disclosure.

Next, we note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The information we have marked consists of a contract relating to the expenditure of funds by a governmental body and is subject to section 552.022(a)(3) of the Government Code. The comptroller's office must release information subject to section 552.022(a)(3) unless the information is made confidential under the Act or other law. *Id.* You raise section 552.103 as an exception to disclosure of the information at issue. However, section 552.103 is a discretionary exception that does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the information we have marked may not be withheld under section 552.103 of the Government Code. However, we will consider your arguments under section 552.103 of the Government Code for the remaining information not subject to section 552.022.

Section 552.103 of the Government Code provides in relevant part:

(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's office has the burden of providing relevant facts and documents to show 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 of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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's office must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and have provided documentation showing, that a lawsuit styled *United States of America et. al v. American Express Company et. al*, Civil Action No. CV-10-4496, was filed in the United States District Court for the Eastern District of New York, prior to the date the comptroller's office received the request. You state the comptroller's office is not a named party in the lawsuit at issue. However, you provide documentation showing the State of Texas is a named party to the lawsuit. In such a situation, we require an affirmative representation from a governmental body with the litigation interest that the governmental body wants the information at issue withheld under section 552.103. The OAG has submitted a written representation to our office stating it objects to release of the information at issue because it relates to pending litigation against the State of Texas.<sup>2</sup> Based on these representations and our review, we determine the litigation was pending on the date the comptroller's office received the request for information and the information at issue is related to the pending litigation for the purposes of section 552.103. Accordingly, the comptroller's office may withhold the information not subject to section 552.022 on behalf of the OAG under section 552.103 of the Government Code.

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. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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<sup>2</sup>We note the OAG informs us it does not object to the release of information subject to section 552.022 of the Government Code.

We note some of the information subject to section 552.022 may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, to the extent the marked information is identical to the information previously requested and ruled upon by this office in Open Records Letter No. 2010-17409, the comptroller's office must continue to rely on this ruling as previous determination and withhold or release any previously ruled upon information in accordance with this prior ruling. The comptroller's office may withhold the information not subject to section 552.022 on behalf of the OAG under section 552.103 of the Government Code.<sup>3</sup> The remaining information must be released; however, any information protected by copyright may only be released in accordance with copyright law.

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,



Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VB/dls

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Ref: ID# 457737

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Ms. Jordan Hale  
Assistant Attorney General  
General Counsel Division  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548  
(w/o enclosures)