



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 28, 1994

Ms. Elaine L. Fannin
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR94-716

Dear Ms. Fannin:

You asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29334.

The Texas Department of Agriculture (the "department") received a request for information about a pesticide incident investigated by the department. The department contends that the information is excepted from disclosure under section 552.103(a). To show the applicability of section 552.103(a), a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *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 (1990) at 4.

You submitted information showing that the matter is set for a contested administrative hearing as provided by the department's rules. See 4 T.A.C. §§ 1.5 - .27. The department's rules provide that contested hearings are subject to the Administrative Procedure Act ("APA"), Government Code chapter 2001.¹ 4 T.A.C. §§ 1.2, .3. For purposes of section 552.103(a), this office considers a contested case under the APA to constitute litigation. Open Records Decision No. 588 (1991) at 7 (construing statutory predecessor to the APA). Also, a review of the records submitted to this office shows

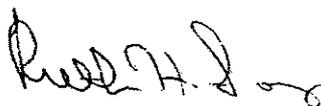
¹The department's rules refer to the Administrative Procedure and Texas Register Act ("APTRA"), V.T.C.S. art. 6252-13a. We note that APTRA was the statutory predecessor to the APA.

that the records are related to the litigation.² However, although you have shown that litigation is pending and these records are related to the pending litigation, some of these records may not be withheld from disclosure under section 552.103(a).

Section 552.103(a) was designed to prevent the use of the Open Records Act as a method of avoiding the rules of discovery. Attorney General Opinion JM-1048 (1989) at 4. This exception enables a governmental body to protect its position in litigation by requiring information relating to that litigation to be obtained through the discovery process. Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 (1982) at 2. Our review of the records submitted to this office shows that the opposing party in the pending litigation has already seen some of these records. Since the opposing party in the pending litigation has already seen some of the records, there is no justification for now withholding those records from the requestor pursuant to section 552.103(a). We have marked records which must be released because the opposing party in the pending litigation has already seen them. We note that if the opposing party has already seen or had access to the other records at issue, whether marked by this office or not, these must also be released.

To the extent that the opposing party has not seen or had access to the records at issue, they may be withheld from disclosure under section 552.103(a). We note that 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) at 3. Also, since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is within the department's discretion to release this information to the requestor. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4. We are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/rho

²We have marked two documents that do not appear to be responsive to the request.

Ref.: ID# 29334

Enclosures: Marked and submitted documents

cc: Mr. Duwane Billings
Rt. 1, Box 320
Seagraves, Texas 79359
(w/o enclosures)