



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 28, 1995

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

OR95-105

Dear Ms. Fannin:

You have 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# 26536.

The Texas Department of Agriculture (the "department") received a request for information about an investigation into possible violations of state pesticide regulations. You submitted documents responsive to that request to this office for review. We note that some of the submitted documents are medical records, access to which is governed by the Medical Practice Act, V.T.C.S. art. 4495b, § 5.08; Open Records Decision No. 565 (1990). Section 5.08(b) of the Medical Practice Act states:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

Section 5.08(j)(1) provides for release of medical records upon the patient's written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. You submitted to this office copies of the consent forms authorizing the department to receive the records. Section 5.08(j)(3) requires that any subsequent release of medical records be consistent with the purposes for which the department obtained the records. Open Records Decision No. 565 at 7.

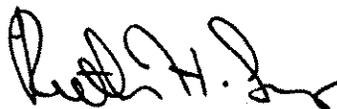
You contend that the other documents submitted to this office are excepted from disclosure under section 552.103(a) of the Government Code. To show the applicability of section 552.103(a), a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information 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. Litigation for purposes of section 552.103(a) includes contested administrative proceedings. Open Records Decision No. 588 (1991) at 7. The department has supplied this office information that shows litigation is reasonably anticipated. A review of the documents submitted to this office shows that they are related to the anticipated litigation. However, for the reasons explained below, some of the documents at issue must be released.

One of the documents submitted to this office is a letter written by an opposing party in the anticipated litigation. Several other documents have already been disclosed to the opposing party in the anticipated litigation. 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. For your convenience, we have marked the letter written by the opposing party and the other documents that we can tell have already been disclosed to the opposing party. However, whether the documents have been marked or not, you must release the documents at issue that the other party to the anticipated litigation has seen or had access to.

The applicability of section 552.103(a) also ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3. We note that 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 the documents other than the medical records 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. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/MRC/rho

Ref.: ID# 26536

Enclosures: Marked documents

cc: Ms. Michelle Shircliffe
Paralegal
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(w/o enclosures)