



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 25, 1995

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

OR95-216

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# 31854.

The Texas Department of Agriculture (the "department") received a request for the investigation report of a possible violation of state pesticide regulations. You submitted to this office for review as responsive to the request the department's investigation file concerning the alleged violation. You contend that the requested documents 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 the information at issue is related to pending or reasonably anticipated 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. For purposes of section 552.103(a), this office considers a contested case under the Administrative Procedure Act, chapter 2001 of the Government Code, to be litigation. Open Records Decision No. 588 (1991) at 7. You have provided information indicating that administrative litigation is reasonably anticipated. Our review of the investigation file shows that the documents at issue are related to the subject matter of the anticipated litigation. The department has shown the applicability of section 552.103(a).

However, several of the documents in the investigation file appear to 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, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 (1982) at 2. We have marked the documents that we assume have been seen by 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 remaining documents may be withheld from disclosure pursuant to section 552.103(a).

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) 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 the documents 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/rho

Ref.: ID# 31854

Enclosures: Marked documents

cc: Mr. David Higgins
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(w/o enclosures)