



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 22, 1995

Ms. Suzanne E. Giesecke  
Assistant General Counsel  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR95-1593

Dear Ms. Giesecke:

The Texas Department of Agriculture (the "department") asks for reconsideration of Open Records Letter No. 94-711 (1994). That letter involved a request under the Open Records Act<sup>1</sup> for the investigative report for Complaint Number 03-94-0050. You informed us that when the department received this request, the investigative report had not been prepared. You now submit this report, which is dated October 28, 1994, and assert that it is excepted from required public disclosure based on section 552.103 of the Government Code.

The Open Records Act does not apply to information that is not in existence when the request for information is submitted to a governmental body. *See* Open Records Decision Nos. 476 (1987), 465 (1987). Therefore, the Open Records Act did not apply to the investigative report at issue in Open Records Letter No. 94-711 (1994), since it was not prepared when the department received the request. This means that the Open Records Act does not require the department to seek an open records decision from this office when it receives a request for information that does not exist.

Since it appears likely that the requestor will submit another request for the investigative report now that it has been prepared -- indeed, he made another request on October 6, 1994<sup>2</sup> -- we will consider your claim that the report is excepted from required public disclosure under section 552.103 of the Government Code. *See* Open Records Decision No. 476 (1987).

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<sup>1</sup>Chapter 552 of the Government Code.

<sup>2</sup>This October 6, 1994, request is worded like the original request: "Please advise when a copy of your investigative report will be available." The Open Records Act does not require a governmental body to inform a requestor that requested information comes into existence. Open Records Decision No. 452 (1986). Thus, a governmental body has no duty to comply with a request for information as it is prepared in the future. *See* Open Records Decision No. 465 (1987).

Section 552.103 of the Government Code excepts from required public disclosure information that relates to pending or reasonably anticipated litigation to which a governmental body is a party. *See* Open Records Decision No. 588 (1991). You say that the prosecuting attorney has determined that litigation is reasonably likely and that the requested information is relevant to that litigation. However, in your original request, you made this statement before the report was prepared.

A prior decision of this office has found that the department may withhold from required public disclosure pursuant to section 552.103 pending pesticide complaint investigatory files if the department's attorney finds that litigation is reasonably likely to result and that the information is relevant to that litigation. *See* Attorney General Opinion MW-575 (1982). We believe that if the prosecuting attorney's determination that litigation is reasonably likely is based on such attorney's review of the investigatory report, the department has established that litigation is reasonably anticipated in this case. We also believe that the requested information relates to the anticipated litigation. We, therefore, conclude that the investigative report for Complaint Number 03-94-0050 is excepted from required public disclosure under section 552.103 of the Government Code if the prosecuting attorney for the case determined that litigation is reasonably likely based on his or her review of the investigatory report.

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,



Kay Guajardo  
Assistant Attorney General  
Open Government Section

KHG/rho

Ref.: ID#30378

Enclosures: Submitted documents

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