



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 10, 1996

Mr. David R. Gipson  
Assistant General Counsel  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR96-0526

Dear Mr. Gipson:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 39298.

The Texas Department of Agriculture (the "department") received a request for all information on complaint number 05-96-0013 relating to the improper use of pesticides. You state that this complaint is currently under investigation and is still pending. You state that the department is investigating whether a violation of the Texas Agriculture Code has occurred. You also state that if the department determines that a violation occurred, you intend to prosecute the case. You claim that the requested information is excepted from required public disclosure under section 552.103(a) of the Government Code. You have submitted the documents associated with the complaint at issue.

To show that section 552.103(a) is applicable, the department must demonstrate 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. Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 (1991) at 7. Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

The department is authorized to investigate pesticide-related complaints and may assess penalties for violations of chapters 75 and 76 of the Agriculture Code. Agric. Code

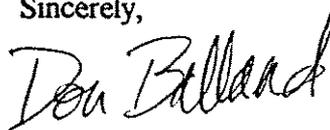
§ 76.1555(a). Proceedings conducted after assessment of a department penalty are subject to the Administrative Procedure Act. *Id.* at § 76.1555(h). In this instance, the department has supplied this office with information which shows that an investigation is pending, and that if a violation is discovered, the department will take enforcement action as authorized by statute. We conclude that litigation is reasonably anticipated. We additionally find that the documents submitted by the department are related to the reasonably anticipated litigation for the purposes of section 552.103(a). The documents may, therefore, be withheld pursuant to section 552.103.<sup>1</sup>

Among the submitted materials, however, there appear to be documents to which the opposing party may have already had access, such as the "Pesticide Incident Investigation Reports, Complaint Information" (numbered pages 4, 5, 6), the "Residue Sample Collection Reports" (numbered pages 16 and 18), the "Notice of Inspections" (numbered pages 19 through 22), and the "Medical Authorization" (numbered page 23). Generally, 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). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed.

Further, section 552.007 prohibits selective disclosure of information by a governmental body. Generally once a document has been released to one member of the public, it "must be made available to any person." Gov't Code § 552.007(b). Once governmental bodies have disclosed information relating to litigation, they are typically precluded from invoking section 552.103 to withhold that information from others. *See, e.g.,* Open Records Decision Nos. 349 (1982), 320 (1982).

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 should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Don Ballard  
Assistant Attorney General  
Open Records Division

JDB/ch

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<sup>1</sup> 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).

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Enclosures: Submitted documents

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(w/o enclosures)