



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 25, 1996

Rick Perry  
Commissioner  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR96-2191

Dear Commissioner Perry:

You ask 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# 102241.

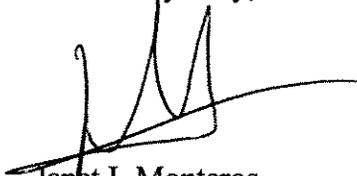
The Texas Department of Agriculture (the "department") received a request for a copy of "the report concerning complaint No. 03-96-0027." You have released some information, but the department seeks to withhold the remaining portions of the requested information based on section 552.103 of the Government Code. You enclosed a copy of the requested information you seek to withhold.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing 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. The department must meet both prongs of this test for information to be excepted under section 552.103(a). Assessments of administrative penalties are governed by the Administrative Procedures Act (the "APA"), Government Code chapter 2001. *See* Agric. Code §§ 76.116, 76.1555(h), *Lauderdale vs. Texas Dep't of Agric.*, 923 S.W.2d 834 (Tex. App.--Austin 1996, no writ) (where owner of aerial service sought judicial review of order of the department which imposed penalties). 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 APA). We conclude that litigation is reasonably anticipated.

After reviewing the documents, we conclude that they are related to the anticipated litigation. Therefore, the department may withhold the requested documents under section 552.103. We note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, 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).

We are resolving this matter with this 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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Janet I. Monteros', with a long horizontal flourish extending to the right.

Janet I. Monteros  
Assistant Attorney General  
Open Records Division

JIM/rho

Ref.: ID#102241

Enclosures: Submitted documents

cc: Mr. Forrest Harter  
P.O. Box 11  
Blessing, Texas 77419  
(w/o enclosures)