



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 3, 1997

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

OR97-2430

Dear Mr. Gipson:

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# 110614.

The Texas Department of Agriculture (the "department") received a request for information concerning TDA Incident No. 01-97-0024. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.103(a) excepts from disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103, a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). A contested case under the Administrative Procedure Act is litigation for purposes of section 552.103. Open Records Decision No. 588 (1991). To demonstrate that litigation is reasonably anticipated, the governmental body 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.

Pursuant to chapter 76 of the Agriculture Code, the department is authorized to enforce state pesticide laws and assess administrative penalties for violations of those laws. Agric. Code §§ 76.1555(a), 12.020(a). Proceedings conducted after the assessment of a department penalty are subject to the Administrative Procedure Act. *Id.* at § 12.020(s). The department collected the information at issue while conducting an investigation pursuant to chapter 76 of the Agriculture Code. The investigation is pending, and you state that the department will take appropriate enforcement action should it conclude from its investigation that a violation of chapter 76 has occurred. Under these circumstances, we conclude that the department reasonably anticipates litigation, and that the information at issue relates to the anticipated litigation. Thus, the department may withhold the information submitted to this office for review from disclosure under section 552.103.

Generally, however, if the opposing parties in the anticipated litigation have seen or had access to any of the information at issue, there would be no justification for withholding that information 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 concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/glg

Ref.: ID# 110614

Enclosures: Submitted documents

cc: Mr. Mike Massey
P.O. Box 189
Roscoe, Texas 79545
(w/o enclosures)