



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 17, 1997

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

OR97-2761

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# 111526.

The Texas Department of Agriculture (the "department") received a request for information relating to a department investigation, TDA Incident Number 2424-05-97-0035 regarding possible violations of state or federal pesticide laws. You state that the investigation in this matter is ongoing. The department seeks to withhold portions of the requested information under section 552.103 of the Government Code. You enclose the documents 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).

The department is authorized to investigate complaints involving the misuse of pesticides. If the department determines that a violation occurred, it may assess penalties in accordance with chapters 75 and 76 of the Agriculture Code. Agric. Code §76.1555(a). We observe that administrative penalty hearings as contested case proceedings are governed by the Administrative Procedures Act (the "APA"), Government Code chapter 2001. *Id.* at §76.1555(h). 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). Therefore, you have met the first prong of the litigation exception in showing that litigation is reasonably anticipated.

We have reviewed the documents at issue and conclude they are related to the anticipated records. Therefore, the department may withhold the requested documents under section 552.103(a). 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 111526

Enclosures: Submitted documents

cc: Ms. Mary Thomas
1806 Swan Lane
Harlingen, Texas 78550
(w/o enclosures)