



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 26, 1998

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

OR98-0247

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# 111974.

The Texas Department of Agriculture (the "department") received a request for information relating to a department investigation, TDA Incident Number 2424-01-97-0033, into possible violations of state or federal pesticide laws. You state that the investigation in this matter is ongoing, and that certain materials related to the investigation have been released to the requestor. The department, however, seeks to withhold the remaining 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).<sup>1</sup>

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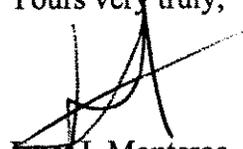
<sup>1</sup>The department is currently the primary enforcement authority for pesticide matters under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), acting jointly with the Environmental Protection Agency under a cooperative agreement authorized by 7 U.S.C. § 76.007(a), (g).

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.

The investigation and legal analysis in this matter is ongoing. We have reviewed the documents at issue and conclude they are related to the anticipated litigation. 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,



Jane I. Monteros  
Assistant Attorney General  
Open Records Division

JIM/glg

Ref.: ID# 111974

Enclosures: Submitted documents

cc: Mr. Monty L. Cotter  
Adjuster  
Cotter Claims Service  
P.O. Box 384  
Panhandle, Texas 79068  
(w/o enclosures)