



December 3, 1999

Ms. Susan Combs  
Commissioner  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR99-3498

Dear Commissioner Combs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 129870.

The Department of Agriculture (the "department") received two requests for copies of an incident report. The first request was received from Mr. Myles Frische on September 15, 1999 (department tracking number TDA-OR-00-0003). The second request was received from Mr. Larry W. Anderson on September 16, 1999 (department tracking number TDA-OR-00-0002). 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 have reviewed the submitted information.

The 76<sup>th</sup> Legislature amended section 552.103 of the Government Code to read as follows<sup>1</sup>:

- (a) Information is excepted from the requirements of Section 552.021 if it is information relating to litigation of a civil or criminal nature 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.

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<sup>1</sup>Act of May 25, 1999, 76<sup>th</sup> Leg., R.S., ch. 1319, § 6, 1999 Tex. Sess. Law Serv. 4500, 4502 (Vernon) (codified as an amendment to Gov't Code § 552.103).

(b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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 at 4 (1990). 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 at 7 (1991). 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 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

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 §§ 12.020, 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 the department will take enforcement action as authorized by statute. We conclude that litigation is reasonably anticipated. We additionally find that the submitted documents relate to the reasonably anticipated litigation for the purposes of section 552.103(a). *Texas Legal Found.*, 958 S.W.2d at 483. The requested information may, therefore, be withheld pursuant to section 552.103.

Although you indicate that the information involves an ongoing investigation, we believe that it is important to note that, if the requested investigation and resulting report are complete, a recent change to the Public Information Act makes the report public. The Seventy-sixth Legislature amended section 552.022 of the Government Code to make certain information expressly public, and therefore not subject to discretionary exceptions

to disclosure. Act of May 25, 1999, 76<sup>th</sup> Leg., R.S., ch. 1319, § 5, 1999 Tex. Sess. Law. Serv. 4500, 4501-4502 (Vernon) (codified as an amendment to Gov't Code § 552.022). Section 552.022 now states in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law

One such category of expressly public information under section 552.022 is “a completed report, audit evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108. . . .”<sup>2</sup> While we agree that incomplete reports, audits, evaluations, or investigations may be withheld when litigation is pending or reasonably anticipated, if the report or investigation has been completed, it is expressly made public by section 552.022(a)(1). Information expressly made public by section 552.022 may be withheld only if it is confidential by law. The exception you assert, Government Code section 552.103, does not make information confidential by law. If the department has not concluded the investigation at issue in this request, then the department could withhold the information pursuant to section 552.103 of the Government Code.

Finally, we note that if the opposing party in the anticipated litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). However, if the records contain information that is confidential by law, you must not release such information even at the conclusion of the litigation. Gov't Code §§ 552.101, .352.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

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<sup>2</sup>Act of May 25, 1999, 76<sup>th</sup> Leg., R.S., ch. 1319, § 5, 1999 Tex. Sess. Law. Serv. 4500, 4501 (Vernon) (codified as an amendment to Gov't Code § 552.022(a)(1)).

*Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Carla Gay Dickson  
Assistant Attorney General  
Open Records Division

CGD/nc

Ref: ID# 129870

Encl. Submitted documents

cc: Mr. Larry W. Anderson  
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Mr. Myles Frische  
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