



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 24, 2007

Ms. Lisa Woods
Deputy Commissioner
Texas Department of Agriculture
P. O. Box 12847
Austin, Texas 78711

OR2007-00826

Dear Ms. Woods:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 269773.

The Texas Department of Agriculture (the "department") received a request for "records of the [department] related to the death of [twenty-seven] horses at Carousel Acres Equestrian Facility in Brazos County, Texas, on or about August 2006."¹ You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹For your reference, the department has designated this request number PIR-07-093.

²Although you raise section 552.101 of the Government Code in conjunction with the attorney-client and attorney work product privileges, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Accordingly, we consider your claim regarding the attorney-client privilege under section 552.107, see Gov't Code § 552.107, and your claim regarding the attorney work product privilege under section 552.111, see *id.* § 552.111. Furthermore, although you raise section 552.228(b)(3) of the Government Code, this section is not an exception to disclosure under the Act. *Id.* § 552.228(b)(3); see also *id.* § 552.301(a) (noting that exceptions to disclosure under Act are found at subchapter C of chapter 552 of Government Code).

You claim the information submitted as Exhibits B, C, D, J, M, and Q is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides in relevant part:

(a) Information is excepted from [required public disclosure] 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.

...

(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.

Gov't Code § 552.103(a), (c). The governmental body 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 on the date of the governmental body's receipt of the request, 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines that it should be withheld pursuant to Gov't Code § 552.103 and that litigation is "reasonably likely to result"). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to the APA).

You explain that the department is authorized to investigate pesticide use and distribution pursuant to chapter 76 of the Texas Agriculture Code. Agric. Code §§ 12.020, 76.1555(a).

You state section 76.155 of the Agriculture Code authorizes the department to assess an administrative penalty against a person who violates regulatory provisions and rules under chapter 76 of the Agriculture Code. You also state that under the procedural section of the Agriculture Code, the department's administrative actions are contested cases subject to the APA. *Id.* § 12.020(s). In this instance, you explain that the submitted information relates to an ongoing investigation into possible violations of state pesticide laws for which litigation, in the form of a contested case, is anticipated. Based on your arguments and our review of the submitted information, we conclude that you have shown that litigation was reasonably anticipated when the department received the request for information, and that the information at issue relates to the anticipated litigation. Therefore, you may withhold the information in Exhibits B, C, D, J, M, and Q under section 552.103 of the Government Code.³

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the case at issue is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim e-mail addresses in Exhibits G and H are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses you have highlighted in Exhibits G and H are not of the type specifically excluded by section 552.137(c). Therefore, the department must withhold the e-mail addresses you highlighted in Exhibits G and H in accordance with section 552.137 unless the department receives consent for their release.

Finally, you note that a portion of the remaining submitted information may be subject to copyright protection. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright protection unless an exception applies to the information. *Id.* If a member of

³As our ruling on these issues is dispositive, we need not address your remaining arguments against disclosure of this information.

the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

Accordingly, the department may withhold Exhibits B, C, D, J, M, and Q under section 552.103 of the Government Code at this time. The department must withhold the e-mail addresses highlighted in Exhibits G and H under section 552.137 unless the department receives consent for their release. The remaining submitted information must be released to the requestor; however, in releasing information that is protected by copyright, the department must comply with copyright law.

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. *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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling,

be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/eb

Ref: ID# 269773

Enc. Submitted documents

c: Mr. Paul W. Murphy
3131 Briarcrest Drive, Suite 111
Bryan, Texas 77802
(w/o enclosures)