



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 17, 1996

Ms. Elaine L. Fannin
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR96-0042

Dear Ms. Fannin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 34409.

The Texas Department of Agriculture (the "department") received a request for "[a]ll complaints made against Voluntary Purchasing Group and its subsidiaries since 1985 and any documents pertaining to those complaints." You state that the department has provided the requestor with some of the requested information. However, you claim that portions of the requested information are excepted from disclosure under sections 552.103(a) and 552.107 of the Government Code. You have submitted representative samples of the documents you claim are excepted from required public disclosure.¹

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.

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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).

You have submitted to this office the original petition and other pleadings in a lawsuit filed by the State of Texas against Voluntary Purchasing Groups, Inc. We are informed that the litigation is still pending. We conclude, based on a review of the documents, that, with the exceptions noted below, the documents are related to the litigation. The department may therefore withhold the requested documents to which the opposing party has not had access. We note that generally 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).²

There are two documents that appear to have been filed and recorded in the deed records of Hopkins County, Texas. As they are public records, the department may not withhold them under section 552.103(a). *See* Open Records Decision No. 551 (1990).

We note that the submitted documents contain correspondence between the department and the opposing party and its counsel. As these documents have been seen by the opposing party, they are not excepted from disclosure under section 552.103(a). These documents are also not protected from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. Correspondence with opposing counsel is not a confidential communication between attorney and client and consequently does not fall within the privilege. Therefore, the department may not withhold these documents under section 552.107.

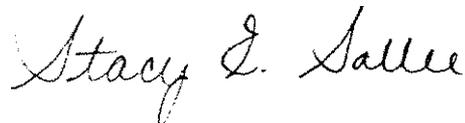
We note that the submitted documents contain Open Records Letter No. 91-623 (1991) and the department's request for that ruling. The department may not withhold these documents from disclosure. First, both the request and the ruling were sent to opposing counsel, the requestor. Second, Open Records Act requests and letter rulings by this office on those requests are public. *See* Gov't Code § 552.021; Open Records Decision No. 459 (1987). Therefore, neither section 552.103 nor section 552.107 excepts these documents from required public disclosure.

²In addition, the applicability of section 552.103(a) generally ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

There is one document that we conclude contains a request for legal advice that is not related to the litigation. We conclude that the department may withhold that document under section 552.107(1). We have marked that document for your convenience.

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 upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/

Ref.: ID# 34409

Enclosures: Marked documents

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