



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 12, 1996

Ms. Esther Hajdar
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR96-0311

Dear Ms. Hajdar:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 38994.

The Texas Department of Agriculture (the "department") received a request for "all lab analysis reports, witness statements, investigative reports, and any other reports" concerning complaint # 01-95-0052" relating to the improper use of pesticides. You state that the department's legal staff is currently reviewing the complaint. You claim that the requested information is excepted from required public disclosure under section 552.103(a) of the Government Code. You have submitted the documents associated with the complaint at issue.

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. *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. 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 (1991) at 7. 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 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

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 § 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, you state that administrative penalties have been assessed and that litigation in the form of a contested hearing is likely to occur. We conclude that litigation is reasonably anticipated. We additionally find that the documents submitted by the department are related to the reasonably anticipated litigation for the purposes of section 552.103(a).

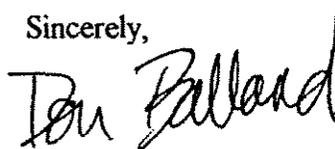
Among the submitted materials, however, there appear to be documents to which the opposing party may have already had access, such as the "Pesticide Incident Investigation Report, Complaint Information" (numbered page 34) and the maps following (numbered pages 36 and 37). Generally, once information 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 anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed.

Further, section 552.007 prohibits selective disclosure of information by a governmental body. Generally once a document has been released to one member of the public, it "must be made available to any person." Gov't Code § 552.007(b). Once governmental bodies have selectively disclosed information relating to litigation, they are typically precluded from invoking section 552.103 to withhold that information from others. *See, e.g.*, Open Records Decision Nos. 349 (1982), 320 (1982).

We note that 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 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.

Sincerely,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref.: ID# 38994

Enclosures: Submitted documents

cc: Mr. Craig Henderson
2719 Harvard Avenue
San Angelo, Texas 76904
(w/o enclosures)