



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 24, 1996

Ms. Abigail C. Klamert  
Assistant General Counsel  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR96-0798

Dear Ms. Klamert:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 40365.

The Texas Department of Agriculture (the "department") received a request for information seeking all documents concerning complaint number 05-96-0006 which relates to the use of pesticides. The request for information also seeks a copy of "the current penalty matrix along with its effective date and a copy of the current rules of the Texas Department of Agriculture." You have submitted the documents associated with the complaint at issue. It appears from your request for a decision and the submitted documents, however, that you seek only to withhold the department's investigation file on complaint number 05-96-0006. Consequently, this ruling addresses only that information submitted to this office for review, the investigation documents. You claim that the requested information submitted by the department is excepted from required public disclosure under section 552.103(a) of the Government Code.

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.

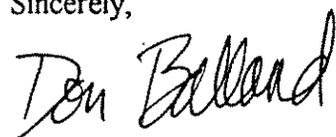
The department is authorized to investigate pesticide-related complaints and may assess penalties for violations of chapters 75 and 76 of the Agriculture Code. Agric. Code § 76.1555(a). Proceedings conducted after assessment of a department penalty are subject to the Administrative Procedure Act. *Id.* at § 76.1555(h). You state that complaint 05-96-0006 is currently under investigation. You explain that administrative penalties have been assessed in the case and that a hearing has been requested. 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). The documents may, therefore, be withheld pursuant to section 552.103.

Among the submitted materials, however, there appear to be documents to which the opposing party may have already had access. 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.

Additionally, we note that the applicability of section 552.103(a) ends once the litigation has 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# 39298

Enclosures: Submitted documents

Ms. Abigail C. Klamert - 3

cc: Mr. Greg M. Powers  
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(w/o enclosures)