



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 29, 1996

Mr. John T. Richards
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR96-1984

Dear Mr. Richards:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID#101941.

The Texas Department Of Health (the "department") received a request for information concerning a flash fire that occurred on the premises of its Texas Center for Infectious Disease (the "TCID") on July 12, 1996 specifically:

1. Manufacturer and/or installer of overhead sprinkler system installed as for fire suppression purposes in the kitchen in which Olmos Environmental Services, Inc. was working.
2. An incident report and/or investigation report prepared by your agency.
3. A copy of any photographs that you may have on file.

The department seeks to withhold the requested information based on sections 552.103(a) and 552.107(1) of the Government Code. You enclosed representative samples of the information the department seeks to withhold.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

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records 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.

applicable in the instant case. 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. 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).

For purposes of section 552.103(a), this office considers a contested case under the Administrative Procedures Act (the "APA") in chapter 2001 of the Government Code. Open Records Decision No. 588 (1991) at 7 (construing statutory predecessor to APA). You indicate that the Asbestos Program Branch of the department is currently investigating the July 12, 1996 incident to determine whether to pursue an administrative enforcement action against the abatement contractor. *See* 25 T.A.C. §§ 295.68, 295.69. Additionally, we note that the contested case hearing provisions of the Asbestos Program are governed by the Administrative Procedures Act. *See* 25 T.A.C. 295.69(e). The TCID flash fire resulted in a death and injuries to people so it is reasonable, under the totality of the facts in the instant case, to anticipate that civil litigation may ensue in addition to the possibility of administrative action resulting from the current investigation. Open Records Decision No. 518 (1989) at 5. Thus, the first prong is met.

In consideration of the second prong of the section 552.103(a) test, a review of the records at issue reveals that they relate to this potential litigation, as well as the ongoing department investigation.² The second prong is met and the records at issue may be withheld under section 552.103(a).³

We are resolving this matter with this 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 may 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,



Janet H. Monteros
Assistant Attorney General
Open Records Division

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²We note that there is no section 552.103(a) interest once all parties to anticipated litigation have had access to or seen the information at issue, or after the litigation has concluded. Open Records Decision Nos. 349 (1982), 320 (1982).

³As we resolve your request under section 552.103(a), we need not now address your arguments under section 552.107(1).

Ref.: ID# 101941

Enclosures: Submitted documents

cc: Mr. Robert M. Hagy
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(w/o enclosures)