



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 7, 1996

Mr. David R. Gipson
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR96-2059

Dear Mr. Gipson:

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# 101596.

The Texas Department of Agriculture (the "department") received an open records request for "a copy of your report" concerning complaint number 02-96-0041. You submitted to this office for review the available information you contend is at issue. You assert, however, that the information may be withheld pursuant to the Texas Open Records Act, section 552.103 of the Government Code, because the information "relates to reasonably anticipated litigation." You also argue that "the report referenced in the requester's letter has not yet been completed," and assert that the Open Records Act does not require the department to provide to the requestor "information that does not exist."¹ We have considered the exception and arguments you make and have reviewed the documents at issue.

To secure the protection of section 552.103(a), the department must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the

¹We note that chapter 552 does not apply to information that does not exist; see Open Records Decision No. 555 (1990), nor does chapter 552 require governmental bodies to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio, 1978, writ dismissed). We assume that you have advised the requestor if certain information does not exist.

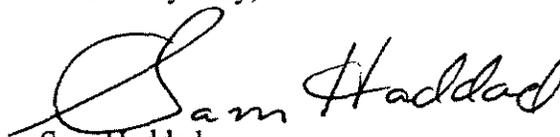
department is a party. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision Nos. 588 (1991) at 1, 551 (1990) at 4. Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). 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 chapter 76 of the Agriculture Code pursuant to section 76.1555. In this instance, the department has supplied this office with information indicating that an investigation is pending and that, if appropriate, the department will take enforcement action as authorized by statute. See Open Records Decision No. 588 (1991) (litigation includes a "contested case" that is before an administrative agency). Thus, we conclude that litigation is reasonably anticipated. We further find that the documents that have been submitted are related to reasonably anticipated litigation for the purposes of section 552.103(a).

The requested records may therefore be withheld pursuant to section 552.103 but only to the extent that the records have not been previously seen by the opposing parties in the anticipated litigation. Generally, absent special circumstances, once information has been obtained by all parties to the litigation, e.g., 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 must be disclosed. We also note that the applicability of this section ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982) (concerning pesticide complaint investigation files); Open Records Decision No. 350 (1982) at 3.

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,



Sam Haddad

Assistant Attorney General
Open Records Division

SH/ch

Ref.: ID# 101596

Enclosures: Submitted documents

cc: Mr. Sam T. Boltz
509 Princeton Drive
Tyler, Texas 75703-5164
(w/o enclosures)