



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 19, 1998

Mr. Rick Perry
Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR98-2784

Dear Mr. Perry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 119743.

The Department of Agriculture (the "department") received a request for information relating to two investigations by the department into possible violations of state or federal pesticide laws. You seek to withhold the requested information under section 552.103 of the Government Code.

Section 552.103(a), known as the litigation exception, excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). You contend that the requested materials were prepared "in anticipation of litigation." You advise that chapter 76 of the Agriculture Code, which relates to pesticide

use and distribution, authorizes the department to assess administrative penalties for violations of the pesticide laws under "contested case" procedures set out in section 12.020 of the Code in conjunction with chapter 2001 of the Government Code. Alternatively, you say, the department may seek to file a lawsuit for a civil penalty as authorized by section 76.156 of the Agriculture Code.

We have considered your arguments and reviewed the information at issue. We conclude that you may withhold the requested information at this time under section 552.103(a). Please note, however, that absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1992), 320 (1982). To the extent the opposing party has seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a). Similarly, section 552.103(a) does not authorize the governmental body to withhold materials which have already been made available to the public. Open Records Decision No. 436 at 7 (1986). Finally, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. 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.

Yours very truly,



William Walker
Assistant Attorney General
Open Records Division

WMW/ch

Ref: ID# 119743

Enclosures: Submitted documents

cc: Mr. Bobby Moser
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(w/o enclosures)