



August 16, 1999

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

OR99-2316

Dear Mr. Gipson:

You ask this office to reconsider our ruling in Open Records Letter No. 99-1369 (1999). Your request for reconsideration was assigned ID# 126517. Your office has assigned this request tracking number TDA-OR-99-0029.

The Texas Department of Agriculture (the "department") received a request for TDA Incident No. 2424-01-99-0002. In Open Records Letter No. 99-1432, this office concluded that the department could not withhold the requested information from disclosure because the department had failed to timely request a ruling from this office. You assert that the department's request for a decision was timely submitted, and have submitted additional information to establish the timeliness of your original request. After reviewing the information presented, we conclude that you have furnished satisfactory proof that your request for a decision was submitted to this office within the statutory time period. *See* Gov't Code § 552.308. Therefore, we will consider the merits of your original argument for withholding the requested information under sections 552.101, 552.103 and 552.107 of the Government Code.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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 at 4 (1990). 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 at 7 (1991). 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

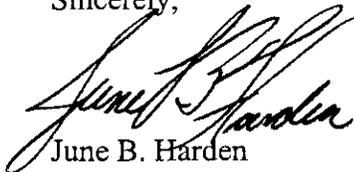
contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

The department is authorized to investigate pesticide-related complaints and may assess penalties for violations of chapter 76 of the Agriculture Code. Agric. Code § 76.007(a). Proceedings conducted after assessment of a department penalty are subject to the Administrative Procedure Act. *Id.* at § 76.1555(h). In this instance, the department has supplied this office with information which shows that there is an ongoing investigation, and the department will take enforcement action as authorized by statute if a violation is found. 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.

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. 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).¹

Open Records Letter No. 99-1369 is overruled to the extent it conflicts with this ruling. If you have any questions regarding this ruling, please contact our office.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref: ID# 126517

Encl. Submitted documents

¹Because we are able to make a determination under section 552.103, we need not address your additional arguments against disclosure.

cc: Mr. Donald Kubecka
Kubecka Operating Company, Inc.
Route 4, Box 417
Seminole, Texas 79360
(w/o enclosures)