



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 21, 2003

Commissioner Susan Combs
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR2003-8388

Dear Commissioner Combs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191580. Your tracking number for this request is TDA-PIR-04-0027.

The Texas Department of Agriculture (the "department") received a request for a specific investigative file, including: (1) any written investigation, (2) any charges that were filed and any fines that were levied, (3) any recorded statement, video, or any other tangible item connected with the above incident, and (4) the field notes, correspondence, reports and anything tangible in nature dealing with the flyover by a "crop duster." You note that some of the responsive information will be released to the requestor. You claim that the inspector's investigation notes and a draft report are excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.103 of the Government Code excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show 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 (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 for purposes of section 552.103. Open Records Decision No. 588 at 7 (1991).

You explain that the department is authorized to investigate pesticide-related complaints and may assess penalties for violations of chapter 76 of the Texas Agriculture Code. Agric. Code §§ 12.020, 76.1555(a). You also state that under the procedural section of the Agriculture Code, the department's actions are contested cases subject to the Administrative Procedure Act. *Id.* § 12.020(s). In this instance, you state that the submitted information relates to an ongoing investigation into possible violations of state or federal pesticide laws for which litigation, in the form of a contested case, is anticipated. Based on your arguments and our review of Exhibit B, we conclude that you have shown that litigation is reasonably anticipated on the day the department received the request for information, and that Exhibit B relates to the anticipated litigation. Therefore, you may withhold the information in Exhibit B under section 552.103 of the Government Code.

We note, however, 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). Furthermore, 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).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

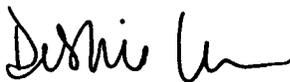
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/lmt

Ref: ID# 191580

Enc. Submitted documents

c: Brinkley L. Oxford
Oxford, Oxford & Gonzalez
116 South 12
Edinburg, Texas 78539
(w/o enclosures)