



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 3, 2011

Ms. Dolores Alvarado Hibbs, General Counsel
Ms. Jessica Escobar, Assistant General Counsel
Texas Department of Agriculture
PO Box 12847
Austin, Texas 78711

OR2011-11213

Dear Ms. Hibbs and Ms. Escobar:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 425853 (TDA-PIR-11-509).

The Texas Department of Agriculture (the "department") received a request for all information related to a specified incident investigated by the department.¹ You indicate some information has been released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111 of the Government

¹You state the department sought and received clarification of the request. *See* Gov't Code § 522.222(b) (stating if information requested is unclear or large amount has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

Code.² We have considered the claimed exceptions and reviewed the submitted representative sample of information.³

Section 552.103 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. 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.); ORD 551 at 4. The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). When the

²Although you raise the attorney-client communications privilege and the attorney work product privilege in conjunction with section 552.101 of the Government Code, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). You also raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. However, we note sections 552.107 and 552.111 of the Government Code are the appropriate exceptions to raise for the attorney-client and attorney work product privileges, respectively, for information not subject to section 552.022.

³We assume the "representative sample" of records submitted to this office is truly representative of the requested records as 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 those records contain substantially different types of information than that submitted to this office.

governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body’s attorney determines that it should be withheld pursuant to Gov’t Code § 552.103 and that litigation is “reasonably likely to result”). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act (“APA”), Government Code chapter 2001, to constitute “litigation.” Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to the APA).

You explain the department is authorized to investigate and enforce the provisions of chapter 76 of the Texas Agriculture Code, regarding pesticide use and distribution. Agric. Code §§ 12.020, 76.1555(a). You state chapter 76 authorizes the department to assess administrative penalties and authorize license sanctions against a person who violates the provisions of that chapter. *See id.* §§ 76.1555(a), 12.0201. You inform us that under the procedural section of the Agriculture Code, these actions are taken through a contested proceeding conducted pursuant to the APA. In this instance, you explain that the submitted information relates to an ongoing investigation into possible violations of state pesticide laws for which litigation, in the form of a contested case, is anticipated. Based on your arguments and our review of the submitted information, we conclude you have shown that litigation was reasonably anticipated when the department received the request for information, and that the information at issue relates to the anticipated litigation. Therefore, you may withhold the requested information under section 552.103 of the Government Code.⁴

We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Once the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Such information is not excepted from disclosure under section 552.103(a) and must be disclosed. The applicability of section 552.103(a) also ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular information 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 information or any other circumstances.

⁴Because our ruling is dispositive, we do not address your remaining arguments against disclosure.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/tf

Ref: ID # 425853

Enc. Submitted documents

c: Requestor
(w/o enclosures)