



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 3, 1996

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

OR96-2283

Dear Mr. Gipson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 102242.

The Texas Department of Agriculture (the "department") received a request for information relating to its price verification program for retail and grocery store scanners. The department has provided the requestor with information about closed cases. You assert that the remainder of the requested information relates to reasonably anticipated litigation and is therefore excepted from disclosure pursuant to section 552.103 of the Government Code.

Section 552.103(a) excepts from 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 governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). A contested case under the Administrative Procedure Act is litigation for purposes of section 552.103. Open Records Decision No. 588 (1991). Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim

that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982).

The department is authorized to investigate price representations under chapter 13 of the Agriculture Code and may assess administrative penalties for violations of that chapter. Agric. Code § 12.020(a). Proceedings conducted after assessment of a department penalty are subject to the Administrative Procedure Act. *Id.* at § 12.020(s). The department gathered the information at issue while conducting an investigation pursuant to chapter 13 of the Agriculture Code. The investigation is pending, and you state that the department will assess administrative penalties should it conclude from its investigation that a violation of chapter 13 occurred. Under these circumstances, we conclude that the department reasonably anticipates litigation, and that the information at issue relates to the anticipated litigation. Thus, the department may withhold the information from disclosure under section 552.103.¹

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 any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 102242

Enclosures: Submitted documents

cc: Mr. Pat Shannon
J.P. Shannon & Associates
P.O. Box 123015
Fort Worth, Texas 76121-3015
(w/o enclosures)

¹We note that if the opposing parties in the anticipated litigation have seen or had access to any of the information at issue, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).