



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 21, 1997

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

OR97-0589

Dear Commissioner Perry:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 104466.

The Texas Department of Agriculture (the "department") received a request for information "on all weights and measures inspection reports concerning gas pump inspections conducted in Houston for the months of November and December." You indicate the department's legal staff is currently reviewing the reports for possible legal action and that the department seeks to withhold all the information based on section 552.103 of the Government Code. You enclose the documents you seek to withhold.

The department has the duty to investigate conditions concerning weights and measures as well as the duty to report these investigations. Agric. Code § 13.005. In fact, at least once every three years or more often as required by the department, a weight or measure is inspected and tested for correctness subject to additional inspections as the department deems appropriate. Agric. Code § 13.101. However, the department must maintain a complete record of all investigations, including a record of inspections made and of prosecutions for violations of the chapter. Agric. Code § 13.006. Furthermore, the statute provides that the investigation records maintained are public information. Agric. Code §13.006(c).<sup>1</sup> It provides:

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<sup>1</sup>The statute is silent as to whether this provision encompasses all the investigations undertaken under the authority of this particular weights and measures program or whether it refers only to a compilation or the report of investigations.

- (a) The department shall maintain a complete record of all acts performed under this chapter, including a record of inspections made and of prosecutions for violations of this chapter.
- (b) The department shall maintain an accurate record of the reports of county and local sealers of weights and measures.
- (c) Records maintained under this section are public information.

Additionally, a person who operates a gasoline fuel pump, or bulk or liquefied petroleum gas metering device for a commercial transaction must register annually with the department. Agric. Code § 13.1011(a),(e).

The enforcement provisions in addition to the investigations, authorize the state to pursue civil penalties and/or injunctive relief for those persons violating the statute or regulations governing weights and measures. Agric. Code §13.007. For example, a person commits an offense as a Class C misdemeanor if the person or the person's servant or agent uses a false weight or measure in buying or selling a commodity or computing a charge for services rendered on the basis of weight or measure. Agric. Code §§ 13.037, 13.041(a).

We note that section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *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 (1990) at 4. The department must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is 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). Even though couched under the rubric of an investigation, the fact that an inspection may result in sanctions or prosecution for any violations found is not sufficient to invoke section 552.103(a). See Open Records Decision No. 462 (1987) at 11-12. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). We have reviewed the "Weights and Measures Inspection Reports" you submitted to this office and note that the reports are not only signed by the inspector but also the owner or manager of the business being inspected.<sup>2</sup> We note that when the opposing party in the

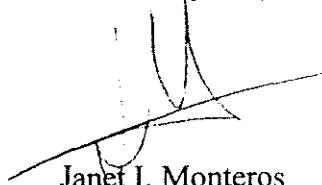
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<sup>2</sup>We note that some of the inspections did not result in any violations. Nonetheless, the department does not segregate the reports as to probability of litigation.

litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Additionally, we note that the statute provides that records maintained of investigations under § 13.006(c) of the Agriculture Code are public information and even if not applicable to the records at hand, we must conclude that you have not met your burden under Section 552.103(a) and the inspection reports must be released.<sup>3</sup>

We are resolving this matter with this 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 may 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,



Janet I. Monteros  
Assistant Attorney General  
Open Records Division

JIM/rho

Ref.: ID# 104466

Enclosures: Submitted documents

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(w/o enclosures)

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<sup>3</sup>Since we address your exception under 552.103(a), we will not examine the application of section 13.006(c) of the Agriculture Code to the department's investigation records in the instant case.

