



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 29, 1994

Mr. Ken Ramirez
Deputy Executive Director
Texas Natural Resource Conservation
Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR94-764

Dear Mr. Ramirez:

The Texas Natural Resource Conservation Commission ("TNRCC") received a request for "a video . . . taken of the progress at the McKinney Landfill, McKinney, Texas." TNRCC has asked if this information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned this request ID# 27198.

TNRCC contends that the information is excepted from disclosure under section 552.103(a). To show the applicability of section 552.103(a), a governmental entity must show that (1) litigation is pending or reasonably anticipated in a judicial or quasi-judicial proceeding 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. In this instance, you have demonstrated that litigation is reasonably anticipated and that the requested information is related to the anticipated litigation. TNRCC has therefore met its burden of showing that the requested information relates to pending litigation for purposes of section 552.103(a).

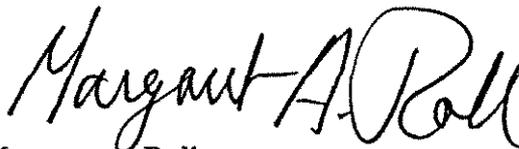
We note, however, that some of the information submitted to this office has already been disclosed to the opposing party in the anticipated litigation. Specifically, a portion of the requested videotape has already been viewed by a representative of the landfill owner. Absent special circumstances, once all parties to the anticipated litigation have had access to the information at issue, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). The

information that has not previously been disclosed may be withheld from disclosure under section 552.103(a). TNRCC must make the previously viewed portion of the videotape available to the requestor.¹

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)* at 3. In addition, since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is within the discretion of TNRCC to release this information to the requestor. *Gov't Code § 552.007*; *Open Records Decision No. 542 (1990)* at 4.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Margaret A. Roll
Assistant Attorney General
Open Government Section

MAR/GCK/rho

Ref.: ID# 27198

Enclosures: Submitted video tape

cc: Mr. Wallace Getz
941 Berkshire Way
Fairview, Texas 75069
(w/o enclosures)

¹You advise that "we do not have any technology that would enable us to depict the disclosed segment of the video tape." To the extent that TNRCC cannot feasibly provide the requestor with a copy of the previously disclosed segment of the video tape, it must permit the requestor to view the previously disclosed segment.