



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 29, 1995

Mr. Paul C. Sarahan
Enforcement Coordination & Litigation Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR95-1633

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 34958.

The Texas Natural Resource Conservation Commission ("TNRCC") received a request for all documents found in the TNRCC files regarding the Alamodome, specifically, documents responsive to 26 categories. You claim that a portion of the requested information is excepted from disclosure under sections 552.103, 551.111, 552.107(1), and 552.102 of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.¹

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. TNRCC 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. TNRCC must meet both prongs of this test for information to be excepted

¹We note that TNRCC has previously received three other requests for the same type of information. We have addressed the applicability of the exceptions claimed by TNRCC to those documents in Open Records Letter No. 95-1590 (1995). We enclose a copy of that ruling for your information.

under 552.103(a). 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 (1991) at 7 (construing statutory predecessor to the APA).

You advise us that the requested information relates to an investigation for possible violations of the Texas Water Code conducted pursuant to sections 26.019 and 26.136 of the Water Code, and you anticipate that the investigation will culminate in a contested administrative case under the APA and possible enforcement of an Agreed Order entered into with one of the potential parties. See Water Code § 26.136(h) (providing that proceedings under section 26.136 are subject to APA). Having examined the information submitted to us for review, we conclude that litigation is reasonably anticipated. We also conclude that the submitted information relates to the anticipated litigation.

Some of the information you have submitted is already available to all parties to the anticipated litigation, such as correspondence between the TNRCC and parties to the anticipated litigation. Generally, when parties to litigation already have copies of the records or have inspected them pursuant to discovery or any other means, section 552.103(a) may no longer be invoked. Open Records Decision No. 597 (1991) (concluding that statutory predecessor to section 552.103 did not except basic information in offense report that was previously disclosed to defendant in criminal litigation); see also Open Records Decision Nos. 551 (1990) at 4, 511 (1988) at 5, 493 (1988) at 2, 349 (1982), 320 (1982). Thus, section 552.103 does not allow you to withhold letters sent to the TNRCC by parties to the anticipated litigation, but annotations written by TNRCC employees on those letters may be withheld. We conclude that you may not withhold the documents numbered 3 and 42 under section 552.103(a).² The remaining information may be withheld from required public disclosure under section 552.103(a) of the Government Code.³

As we have held that TNRCC may not withhold the documents previously disclosed to parties to the anticipated litigation, we must address your other claimed exceptions. We conclude that neither section 552.107 nor section 552.111 excepts these documents from disclosure. Open Records Decision Nos. 574 (1990) (section 552.107 does not apply to communications that are not confidential), 435 (1986) (section 552.111 waived by release of information to public). Therefore, TNRCC may not withhold documents previously disclosed to parties to the anticipated litigation under sections 552.107 or 552.111.

²We cannot determine whether the e-mail that is part of document no. 42 was disclosed to the parties to the potential litigation. If it was not, TNRCC may withhold that e-mail under section 552.103(a).

³We note that the applicability of section 552.103(a) ends once the litigation has concluded. See Open Records Decision No. 350 (1982) at 3.

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 questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/rho

Ref.: ID# 34958

Enclosures: Open Records Letter No. 95-1590 (1995)
Submitted documents

cc: Ms. Erika S. Carter
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(w/enclosure - Open Records Letter No. 95-1590 (1995))