



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 21, 1996

Ms. Susan Owen
Staff Attorney
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR96-0745

Dear Ms. Owen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 39540.

The Texas Natural Resource Conservation Commission ("TNRCC") received a request for e-mail sent or received by certain individuals between January 1, 1996 to March 8, 1996, that discuss EPA concerns regarding the TNRCC federal operating permit program and any delegated federal Clean Air Act programs as these programs relate to public participation and procedures, accessibility of records to the public, and confidentiality of records. You claim that some of the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claimed and have reviewed the information at issue.

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 under section 552.103(a).

We conclude that TNRCC has not met its burden of establishing that section 552.103 applies to the submitted information. The commission refers to "the Virginia lawsuit against EPA" without any explanation. We are unable to determine that TNRCC is a party to any pending litigation with this information. Moreover, we are unable to

determine that the submitted information is related to any pending or reasonably anticipated litigation. See Open Records Decision No. 638 (1996). Therefore, TNRCC may not withhold the submitted information under section 552.103.

Although TNRCC claims that the submitted information is excepted from disclosure under section 552.101, TNRCC has not indicated, and we are not aware of, any statute that would make the submitted information confidential. After reviewing the submitted information, we do not find any information that is protected by privacy. Therefore, TNRCC may not withhold the requested information under section 552.101.

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/ch

Ref.: ID# 39540

Enclosures: Submitted documents

cc: Mr. Richard Lowerre
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(w/o enclosures)