



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 29, 1997

Mr. John A. Riley
Director, Litigation Support Division
Texas Natural Resource Conservation
Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR97-0976

Dear Mr. Riley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 105886.

The Texas Natural Resource Conservation Commission (the "commission") received a request for all correspondence concerning Channel Shipyard, Account No. HG-3585-F. You have released some of the requested information. However, you claim that certain information is excepted from required public disclosure under sections 552.103(a) and 552.111 of the Government Code. You have submitted "copies or representative samples of the specific information requested."¹

To show that section 552.103(a) is applicable, the commission must demonstrate 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. Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 (1991) at 7.

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the commission must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

In this instance, the commission has supplied this office with information which shows that a violation has occurred, and the commission will proceed with a formal enforcement action. We conclude that litigation is reasonably anticipated. We additionally find that the documents submitted by the commission are related to the reasonably anticipated litigation for the purposes of section 552.103(a). Thus, you may withhold the requested information based on section 552.103.²

Among the submitted materials, however, there appears to be a document to which the opposing party may have already had access. Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed.

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).

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

²Because we have resolved the matter under section 552.103, we need not address your section 552.111 claim.

YHL/rho

Ref: ID# 105886

Enclosures: Submitted documents

cc: Ms. Rochelle Mefferd
President
Geo-Basics, Inc.
114 West Clarence Street
Lake Charles, Louisiana 70601
(w/o enclosures)

