



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 3, 1998

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

OR98-0570

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# 112976.

The Texas Natural Resource Conservation Commission (the "commission") received a request for any documents associated with Coastal Refining & Marketing Facilities (SWR #30530 and SWR #31027) ("Coastal") and the CITGO Refining & Chemicals Plants (SWR # 30532). You state that you have released some of the requested information to the requestor. You claim, however, that the remaining information is excepted from disclosure by sections 552.103, 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the sample documents you have submitted.

You argue that the requested information may be withheld under section 552.103 because of a pending enforcement action and a pending lawsuit.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. The commission 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 commission must meet both prongs of this test for information to be excepted under section 552.103(a).

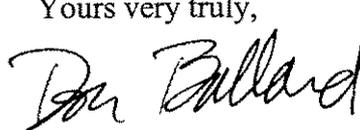
¹We also point out that this office recently stated that if a governmental body wishes to withhold attorney work product, the proper exception to raise is either section 552.103 or section 552.111. Open Records Decision No. 647 (1996). We announced in Open Records Decision No. 647 (1996) that a governmental body must show that the work product (1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and (2) consists of or tends to reveal the thought processes of an attorney. *Id.* at 5.

First, you state that there is currently an enforcement action pending against CITGO - East Plant which may only be resolved through settlement, administrative hearing, or trial. We have reviewed the representative documents for which the commission has asserted section 552.103(a) based on the enforcement action. We conclude that they are related to the pending enforcement action against CITGO - East Plant. Therefore, the commission may withhold the documents in this group under section 552.103(a). See Open Records Letter Nos. 96-1173 (1996), 96-395 (1996). Second, you assert that you may withhold information associated with Coastal because of pending litigation. You explain that the commission commenced an enforcement action against Coastal that is now being pursued in state court. *Coastal Texas v. Coastal Refining & Marketing, Inc.*, No. 92-17287 (345th Dist. Ct., Tavis County, Tex.). After reviewing the submitted material, we find that the requested Coastal documents are related to the pending litigation and may be withheld under section 552.103.

We note, however, that when the opposing party in the 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). 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. In addition, 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). Because we make a determination under section 552.103, we do not address your additional arguments against disclosure. We note, however, that some of the requested information may be confidential by law and must not be released even after litigation has concluded. If you receive a subsequent request for the information, you should re-assert your arguments against disclosure at that time. Gov't Code § 552.352 (distribution of confidential information is criminal offense); see Gov't Code § 552.110.

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,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 112976

Enclosures: Submitted documents

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