



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

October 8, 1998

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

OR98-2391

Dear Mr. Sarahan

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 118583

The Texas Natural Resource Conservation Commission ("TNRCC") received a request for information regarding the investigation notes related to a Mr. Charles Turner. You contend that the responsive information is excepted from disclosure pursuant to sections 552.107 and 552.103 of the Government Code. You have submitted a representative sample of the information which you seek to withhold.<sup>1</sup> We have considered the exceptions that you have raised and the documents submitted.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. An agency urging this exception 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 at 4 (1990). TNRCC must meet both prongs of this test for information to be excepted under section 552.103(a).

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<sup>1</sup> In 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.

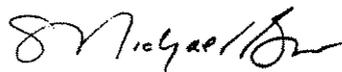
The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You assert that the requestor is a potential adverse party in litigation to be brought by TNRCC. You have supplied a copy of a draft Original Petition naming TNRCC and the requestor as parties. You have also supplied a copy of a TNRCC letter seeking representation by the Attorney General in litigation asserting the TNRCC position as stated in the draft petition. Based on your representations and these supporting documents we conclude that litigation is reasonably anticipated and TNRCC may properly withhold information relating to that litigation. However, the litigation exception applies only when the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Several of the submitted documents have indications that they have been in the possession of the opposing party in this litigation. These documents may not be withheld. We have marked the submitted documents with red tags to indicate which are to be withheld and with green tags to indicate which are to be released. You will 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).

As section 552.107 of the Government Code does not except any of the submitted information that is not also excepted under section 552.103 Government Code, we do not address your arguments under section 552.107.

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,



Michael Jay Burns  
Assistant Attorney General  
Open Records Division

Ref: ID# 118583

Enclosures: Marked documents

cc: Ms. Gloria Moore  
810 Parker Road  
Wylie, Texas 75098-4714  
(w/o enclosures)