



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 21, 1995

Mr. Gregory J. Pfeifer
Enforcement Coordination & Litigation Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR95-1590

Dear Mr. Pfeifer:

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# 24830.¹

The Texas Natural Resource Conservation Commission ("TNRCC") has received several requests for information relating to construction of the Alamodome in San Antonio, Texas. Generally, the requestors seek TNRCC materials prepared by employees of TNRCC or the former Texas Water Commission² during an investigation of contaminated soil on the site of the Alamodome. Among other records, the requestors ask for findings and recommendations of the investigation. In addition, one requestor seeks copies of all Open Records Act requests relating to the Alamodome that have been submitted to TNRCC or the Texas Water Commission by any party. You advise us that TNRCC has made some of the requested information available to the requestors. You seek, however, to withhold the remaining information, which you have submitted to us for review, claiming that sections 552.101, 552.103(a), 552.107, and 552.111 of the Government Code except it from required public disclosure.

¹This ID# includes requests assigned ID## 25721 and 26793.

²The powers, duties, rights, and obligations of the Texas Water Commission have been transferred to the Texas Natural Resource Conservation Commission. Acts 1991, 72d Leg., 1st C.S., ch. 3, § 1.085.

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 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. *See* Water Code § 26.136(h) (providing that proceedings under section 26.136 are subject to APA). In subsequent correspondence dated July 28, 1995, you confirm that an enforcement action, including possible enforcement of an agreed order entered into with one of the parties to the potential litigation, is still anticipated. 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 and an agreed order entered into by a party 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 as to those documents. 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 have indicated which information you may not withhold under section 552.103(a). The remaining information may be withheld from required public disclosure under section 552.103(a) of the Government Code.³

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.

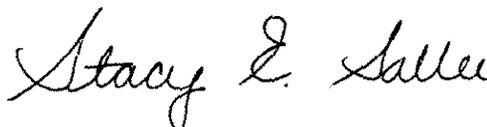
the remaining documents. Section 552.101 provides that information is excepted from disclosure "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You have not identified any statute, constitutional provision or judicial decision that renders these documents confidential, and we are not aware of any. Accordingly, section 552.101 does not apply to these remaining documents.

Section 552.107(1), which protects confidential attorney-client communications, does not apply to information communicated to third parties. Open Records Decision No. 574 (1990) at 5 (communications between attorney and third party are not within attorney-client privilege). Those documents that are not protected under section 552.103(a) are those that have been made available to parties that are adverse to TNRCC in the anticipated litigation. Because this information has been disclosed to third parties, it also is not protected under section 552.107(1).

Section 552.111 of the Government Code excepts "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section excepts those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policy-making processes of the governmental body at issue. Open Records Decision No. 615 (1993). The records under consideration consist of correspondence between private individuals, or correspondence between the Water Commission or the TNRCC and a private individual. These documents are not "interagency or intraagency" communications. Thus, section 552.111 does not apply to this material. Accordingly, it is open to the public.

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 may 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# 24830

Enclosures: Marked documents

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