



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 17, 1997

Mr. Kevin McCalla  
Director, Legal Division  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR97-1413

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 106520.

The Texas Natural Resource Conservation Commission (the "commission") received a request for all relevant records pertaining to Texas Industries' Midlothian cement plant and its RCRA permit for May 1, 1996 to February 27, 1997. You claim that the requested information is excepted from disclosure under sections 552.103(a), 552.107(1), and 552.111 of the Government Code. You have submitted representative samples of the requested information.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

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).

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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.

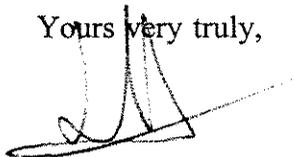
Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990).

A contested case under the Administrative Procedure Act (the "APA"), Gov't Code ch. 2001, is litigation for purposes of applying section 552.103 of the Government Code. See Open Records Decision No. 588 (1991). We believe that, based on the commission's arguments and the submitted documents, litigation is reasonably anticipated. Further, we conclude that the submitted information is related to the anticipated litigation. Therefore, the commission may withhold the requested information under section 552.103(a) of the Government Code.

We note 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). 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). As we are able to resolve your request under section 552.103, we need not address your other claimed exceptions.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Janet I. Monteros  
Assistant Attorney General  
Open Records Division

JIM/glg

Ref.: ID# 106520

Enclosures: Submitted documents

cc: Mr. Jim Schermbeck  
707 Wylie  
Cedar Hill, Texas 75104  
(w/o enclosures)

