



April 1, 1999

Ms. Margaret Hoffman  
Director, Environmental Law Division  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR99-0889

Dear Ms. Hoffman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 124600.

The Texas Natural Resource Conservation Commission (the "commission") received a request for information "dated April 1996 until the present pertaining to Tricon America." You seek to withhold a portion of the requested information under sections 552.103, 552.107, and 552.111 of the Government Code.

Section 552.103(a) excepts from required public disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (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.*

You advise that "[t]he subject matter of the requested documents relates to a site

contaminated with hazardous substances” and that the commission is required to file a cost recovery action against “non-compliant” parties pursuant to section 361.197 of the Health and Safety Code. Having reviewed your arguments, the provisions you cite, and the submitted information, we conclude that the commission may reasonably anticipate litigation to which the information at issue relates. Accordingly, you may withhold the submitted information under section 552.103.

We assume, however, that none of the information in the records at issue has previously been made available to the opposing parties in such anticipated litigation. Absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). To the extent the opposing parties have all seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a). Similarly, section 552.103(a) does not authorize withholding materials which have already been made available to the public. Open Records Decision No. 436 (1986). The applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

Since we have resolved this request under section 552.103, we need not address your other claimed exceptions to disclosure. 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.

Sincerely,



William Walker  
Assistant Attorney General  
Open Records Division

WMW/eaf

Ref.: ID# 124762

Encl: Submitted documents

cc: Ms. Caroline LeMire  
Legal Assistant  
Guida, Slavich & Flores  
5949 Sherry Lane, Suite 1150  
Dallas, Texas 75225  
(w/o enclosures)