



July 13, 1999

Mr. Duncan C. Norton  
General Counsel  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR99-1932

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 125729.

The Texas Natural Resource Conservation Commission (the "commission") received a request for documents relating to the enforcement action against ASARCO. You state that some of the responsive information has been released. You claim, however, that all or portions of the submitted documents are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and have 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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). The commission must meet both prongs of this test for information to be excepted under section 552.103(a).

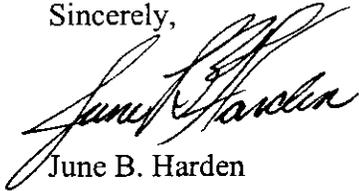
You state that an enforcement case has been pending against ASARCO since early 1998. You also state that "[t]he Executive Director and ASARCO negotiated a settlement, and an Agreed Order was finally presented to the Commission on March 24, 1999." You further explain that "following the Commission's final decision at the March 24, 1999 public meeting a motion for rehearing of the ASARCO matter was filed on April 24, 1999 by [the

requestor] and associated attorneys, representing Northside Properties. This motion for rehearing, which is still pending before the Commission, is the prerequisite to appealing the decision to the Travis County District Court.” Based on the foregoing explanation, we find that the commission has demonstrated the first prong of section 552.103(a). We also find that the information at issue is related to the litigation and may be withheld.

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 concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Because we are able to make a determination under section 552.103, we need not address your additional arguments against 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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Sincerely,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/ch

Ref.: ID# 125729

Encl. Submitted documents

cc: Mr. Mike Davis  
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(w/o enclosures)