



August 25, 1999

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

OR99-2408

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 127726.

The Texas Natural Resource Conservation Commission (the "commission") received a written request for "any documents associated with enforcement actions or investigations performed or contemplated involving Roden Dairy Inc.'s facility in Johnson County." You state that some responsive records held by the commission will be made available to the requestor. You seek to withhold certain other records pursuant to sections 552.103 and 552.111 of the Government Code.

You first contend that the documents constituting "Attachment C-1" may be withheld from the public pursuant to section 552.103 of the Government Code. To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); Open Records Decision No. 588 at 1 (1991). You contend that litigation relating to the records in Attachment C-1 is reasonably anticipated because

[t]here is an administrative enforcement action by [the commission] pending against Roden Dairy, Inc. ("the Respondent"). If the Respondent does not enter into an agreed order as a result of settlement

negotiations within a certain amount of time, this case is on a scheduled management track which will lead to the filing of a petition and the conducting of a contested case enforcement hearing at the State Office of Administrative Hearings.

Given your representations, we conclude that you have made the requisite showing that the these records relate to reasonably anticipated litigation for purposes of section 552.103. The commission, therefore, may withhold the records contained in Attachment C-1 at this time.¹

In reaching this conclusion, however, we assume that 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 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to these records, there would be no justification for now withholding the records from the requestor pursuant to section 552.103. We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You next contend that the marked portions of the two documents you submitted as Attachment C-2 may be withheld from the public pursuant to section 552.111 of the Government Code, which protects from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the policymaking process. Open Records Decision No. 615 at 5 (1993); *see also Austin v. City of San Antonio*, 630 S.W.2d 391 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.). Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 5 (1993).

After reviewing the contents of Attachment C-2, we conclude that the information contained therein does not reflect advice, opinion, or recommendation intended for use in the department's policymaking process. The commission must release both documents contained in Attachment C-2 to the requestor.

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

¹Because we resolve your request under section 552.103, we need not address the applicability of section 552.107 to these documents.

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,

A handwritten signature in black ink that reads "Karen Hattaway". The signature is written in a cursive, flowing style.

Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/RWP/nc

Ref.: ID# 127726

Encl. Submitted documents

cc: Mr. H.W. Trey Jones
Henry, Lowerre, Johnson & Frederick
4006 Speedway
Austin, Texas 78751
(w/o enclosures)