



November 12, 1999

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

OR99-3216

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 128756.

The Texas Natural Resource Conservation Commission(the "TNRCC") received a request for "any documents which relate to the Tom Rowntree dairy." You indicate that you have released some responsive information to the requestor. You have submitted the following items of responsive information to this office for review, asserting that they are excepted from disclosure under sections 552.103(a) and 552.107 of the Government Code:

Enforcement Action Referral;
Requests for Analysis;
Reports of Analysis;
Inspection Sample Reports;
Chain of Custody Record; and
Attorney's notes.

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 or a political subdivision is or may be a party. To secure the protection of section 552.103(a), a governmental body has the burden of providing relevant facts and documents to show 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 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). To be excepted under section 552.103, the information must relate to litigation that is pending or reasonably anticipated at the time that the information was requested. Gov't Code § 552.103(c). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open

Records Decision No. 588 at 7 (1991). You provide comments which demonstrate how each item of the subject information relates to a pending administrative enforcement action. You relate that, while the issues may resolve, the matter is on a "scheduled management track" which will lead to a contested hearing before the State Office of Administrative Hearings. From your representations, we conclude that you have demonstrated that this information is generally excepted from disclosure by section 552.103(a) of the Government Code.

However, absent special circumstances, where the opposing party to the anticipated litigation has had access to the records at issue, no section 552.103(a) 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 any of the information in these records, there is no justification for now withholding that information from the requestor pursuant to section 552.103(a). Also note that 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).

Since this request is resolved under section 552.103, we do not discuss your argument raised under section 552.107 of the Government Code. 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,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 128756

Encl. Submitted documents

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