



The Attorney General of Texas

April 9, 1986

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Mr. Arthur J. von Rosenberg
Assistant General Manager for
Planning & Development
City Public Service of San Antonio
P. O. Box 1771
San Antonio, Texas 78296

Open Records Decision No. 436

Re: Whether documents related to a proceeding before the Railroad Commission, involving a petition to designate areas of Lee & Bastrop Counties as unsuitable for surface lignite mining, are excepted from disclosure under the Open Records Act

Dear Mr. von Rosenberg:

An attorney has asked the City Public Service Board of San Antonio to allow him to inspect and copy the following materials as paraphrased below:

1. All reports, maps, charts, evaluations, investigations, working papers, photographs, research material, and other information prepared for or provided to City Public Service Board and/or the city of San Antonio by Espey Huston & Associates, and/or by any other consultant or consultant firm, and/or by any association of which City Public Service is a member, or which is by any other manner or means in the possession of City Public Service Board and/or the city of San Antonio, concerning and in connection with the Petitions to Designate Areas of Bastrop and Lee Counties as Unsuitable for Surface Mining Operations, Railroad Commission Docket P3.

2. All reports, evaluations, investigations, working papers, research material, and other information concerning and relating to the technological and economic feasibility of reclaiming surface-mined land in Bastrop and Lee Counties, Texas, so as to restore the hydrologic balance of such land areas pursuant to the provisions of the Texas Surface Coal Mining and Reclamation Act, article 5920-11, V.T.C.S., as amended; pursuant to

the Coal Mining Regulations of the Railroad Commission of Texas; pursuant to the federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201; and pursuant to the regulations promulgated by the Office of Surface Mining of the Department of Interior relating to the protection and restoration of the hydrologic balance of surface-mined lands.

3. All reports, evaluations, research material, maps, working papers, and other information concerning, relating to, or being the product of any reclamation study conducted by City Public Service or its agents or independent contractors, concerning and relating to the surface reclamation of surface-mined land in Bastrop and Lee Counties, Texas.

You have asked whether the Open Records Act, article 6252-17a, V.T.C.S., requires the board to comply with this request. You contend that sections 3(a)(1), 3(a)(3), 3(a)(4), 3(a)(5), 3(a)(7), 3(a)(10), 3(a)(11), and 3(a)(13) of the act except the requested materials from required disclosure.

Section 3(a)(3) excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

On April 6, 1984, the requestor asked the City Public Service Board to allow him to inspect certain materials. On April 19, 1984, you sent us a letter containing the following argument concerning section 3(a)(3):

CPS reasonably anticipates litigation in connection with the processing of an application for a surface mining permit which it intends to file with the Surface Mining and Reclamation Division of the Texas Railroad Commission. Although the exact timing of this filing is dependent on CPS's progress in completing acquisition of lignite reserves in a mineable block, the rate of load

growth in CPS's service area, and other factors, CPS's commitment to lignite-fueled generation makes the certainty of its filing of a mining application unquestionable.

Pursuant to the Railroad Commission's Surface Coal Mining Regulations the procedure for instituting litigation in connection with such mining permit applications is clear: following the commission's final decision regarding application for a mining permit, the applicant or any person with an interest which may be adversely affected may request a hearing on the reasons for the final decision (Rule 051.07.04.222). This hearing is of record, adjudicatory in nature, and subject to a hearing examiner's power to subpoena witnesses and documents, compel discovery and take evidence. This type of hearing is clearly 'litigation' within the scope of section 3(a)(3) of the Open Records Act. See Open Records Decision Nos. 288 (1982) and 368 (1983).

CPS will itself request such a hearing if its Application for a mining permit is denied. Conversely, if a permit is granted, CPS reasonably anticipates that persons claiming interests which may be adversely affected, very likely including [the requestor], will request a hearing on the application. Such litigation can reasonably be anticipated based on the facts that (1) such a hearing was recently held by the commission at the behest of interested parties in connection with the application of the Lower Colorado River Authority for a permit to surface mine the Powell Bend area of Bastrop County; and (2) the existence of parties claiming an interest in the areas in which CPS holds lignite properties is evidenced by the petitions to declare large areas of Bastrop and Lee Counties unsuitable for surface mining which were filed at the commission in August, 1983, by [the requestor] and others. This unsuitability proceeding, which will culminate in a public legislative-type hearing at the Railroad Commission required to be held by July, 1984, is presently pending. Unlike the unsuitability proceeding, which involves the application of broad criteria relating to environmental impacts, the mining permit proceeding examines in detail the conduct of mining operations, specific impacts, reclamation and other issues.

The documents in all categories of [the requestor's] request relate directly to issues which are expected to be in controversy in connection with litigation at the mining permit application stage. The criteria for approval of a mining permit include a demonstration that surface mining and reclamation operations, as required by law, can be feasibly accomplished consistent with environmental and other requirements under the proposed mining and reclamation plan; and that an assessment of the probable mining impacts on the hydrologic balance in the general area has been made.

In addition, the correlation between mining application issues and the documents requested are reflected by the minimum requirements for surface mining applications under the Railroad Commission's Surface Mining Rules, which include the following:

. . . .

The fact that some of the requested documents also relate to the subject matter of the presently pending unsuitability proceeding does not diminish their direct relevance to the mining permit application and its hearing process.

As stated in Open Records Decision No. 288,

Section 3(a)(3) prevents governmental entities from possibly having to compromise their position in pending or anticipated litigation or in settlement negotiations by having to divulge information relating thereto. It ensures that one who is or may be involved in litigation with the entity will have to obtain related information in the hands of the entity through the discovery process, if at all. (Emphasis in original).

The present request for records can reasonably be viewed as an attempt by [the requestor] prematurely to obtain records relevant to the permit application proceeding. These are records which he could otherwise obtain only through the discovery procedures allowed by the Railroad Commission's rules in connection with the adjudicative mining application proceeding. Even in that

proceeding, some records are exempt from disclosure, pursuant to statute -- article 5920-11, section 15(14), which CPS hereby claims under exception 3(a)(1). Since any and all of the requested documents could compromise CPS's position in this reasonably anticipated litigation, they should be subject to disclosure only consistent with the protections allowed under appropriate rules of discovery and at the time such rules become applicable.

On April 26, 1984, the requestor withdrew his original request and submitted the present request to inspect and copy materials. On May 10, 1984, you sent us a letter containing the following argument:

[s]ection 3(a)(3) of the act applies and exempts all of the documents in question from public disclosure. CPS re-urges the contentions made in paragraph 1 of its April 19, 1984 letter, which it incorporates by reference here. As reflected in the mining permit portions of the commission's rules listed in that letter, the reclamation-related documents which [the requestor] requests are fully within the scope of the mining permit application proceeding. Likewise, all of the other issues relating to the pending unsuitability proceeding and the related documents are directly relevant to the mining permit proceeding. As pointed out in our previous letter, litigation can reasonably be anticipated as to these reclamation issues. These documents, otherwise obtainable only through the discovery process, have the potential for compromising CPS's position in that litigation and should not be disclosed.

You have advanced two arguments. The first is that section 3(a)(3) authorizes the board to withhold materials relating to the pending proceeding on the Petitions to Designate Areas of Lee and Bastrop Counties Unsuitable for Surface Mining Operations, Railroad Commission Docket P3. The second is that the board will at some future time apply for a surface mining permit, that an administrative hearing will likely be requested after the Railroad Commission rules on this application, and that, pursuant to section 3(a)(3), the board may now withhold materials that would be implicated in that administrative proceeding.

We accept your first argument. The Surface Mining and Reclamation Division of the Railroad Commission has informed us that a hearing has been held on the aforementioned unsuitability petitions and that a decision will soon be rendered. This decision may be

appealed to district court. In our opinion, section 3(a)(3) authorizes the board to withhold materials involved in this unsuitability proceeding. In Open Records Decision No. 301 (1982), this office held that "'litigation' encompasses proceedings conducted in quasi judicial forums as well as strictly judicial ones." Accord Open Records Decision No. 368 (1983). Although it is unclear whether an unsuitability proceeding, described in the rules of the Railroad Commission as "legislative and fact-finding in nature," Rule 051.07.04.081, is a "contested case" within the meaning of the Administrative Procedure and Texas Register Act, article 6152-13a, V.T.C.S., see City of Bastrop v. State of Texas, Docket No. 14,093, Tex. App. - Austin, August 1, 1984 (unreported) (suggesting, but not deciding, that an unsuitability proceeding is a contested case), this proceeding, in our view, involves "litigation" within the meaning of Open Records Decision No. 301, in the sense that it involves "a controversy involving adverse parties before an executive government agency having quasi-judicial powers and employing quasi-judicial procedures."

Your second argument is more tenuous, but we also accept it. Information submitted to this office indicates that the board has been acquiring land in Lee and Bastrop Counties for approximately 30 years, apparently with an eye to beginning mining operations at some future time. Because the board must obtain a permit from the Railroad Commission before it can begin such operations, there can be little doubt that it will eventually apply for such a permit. We conclude, in other words, that it is reasonable to expect that an administrative hearing will be requested and held after the commission issues its decision on the permit application. That hearing would involve "litigation" within the meaning of section 3(a)(3).

As we have noted, section 3(a)(3) may be invoked when litigation is reasonably anticipated. Because CPS indicates that it intends to apply for a mining permit, and because, under the circumstances of this case, "litigation" within the meaning of section 3(a)(3) may be reasonably anticipated, we conclude that section 3(a)(3) is applicable in this instance. You have informed us that in a mining permit proceeding "the conduct of mining operations, specific impacts, reclamation and other issues" will be examined, and that the board will have to

demonstrat[e] that surface mining and reclamation operations . . . can be feasibly accomplished consistent with environmental and other requirements . . . and that an assessment of the probable mining impacts on the hydrologic balance in the general area has been made.

Thus, a wide range of issues will be explored and discussed in the mining permit proceeding. We have examined the materials that were submitted with this request, and we conclude that they would directly

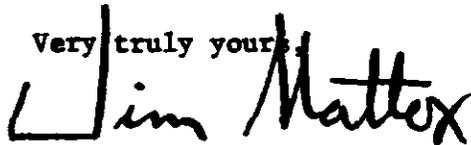
relate to such a proceeding. We conclude, therefore, that section 3(a)(3) authorizes the board to withhold these materials at this time.

In summary, we conclude that section 3(a)(3) authorizes the board to withhold all of the requested materials. We add the following caveats, however. First, it has been suggested that some of these materials have already been made available to the public, i.e., in public discussions or statements. Section 3(a)(3) does not authorize the board to withhold materials which have already been made available to the public. Second, section 3(a)(3) authorizes the board to withhold only those materials which are or will likely be involved in litigation. Section 3(a)(3) protects

information relating to litigation . . . that . . . the respective attorneys of the various political subdivisions [have] determined should be withheld from public inspection.

Unless all of the material at issue here fits in this category, section 3(a)(3) may not be invoked to protect it from required disclosure.

Very truly yours,

A handwritten signature in cursive script that reads "Jim Mattox". The signature is written in dark ink and is positioned to the right of the typed name.

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