



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 29, 1994

Ms. Sharon Lowe  
Staff Attorney  
Intergovernmental Programs Division  
General Services Commission  
P.O. Box 13047  
Austin, Texas 78711-3047

OR94-303

Dear Ms. Lowe:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act ("the act"), chapter 552 of the Government Code.<sup>1</sup> Your request was assigned ID# 24382.

The General Services Commission ("the commission") received a request for the following information:

all records . . . related to the State of Texas Energy Efficient Air Conditioner Program, including without limitation the use of funds available therefore [*sic*] under the Texas Oil Overcharge Restitutionary Act . . . and the contract related thereto between the Trane Corporation and the Texas Department of Commerce including without limitation the following (whether in draft or final form):

- (i) all memoranda, letters, notes, reports and communications related to such matters, and

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<sup>1</sup>The Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

(ii) all charts, graphs, diagrams, schematics, statistics and financial information related to such matters.

You assert that the commission may withhold the requested information based on sections 552.101, 552.103, 552.107(1) and 552.111 of the act.

You contend the commission may withhold all of the requested information based on section 552.103 of the act. To secure the protection of section 552.103, a governmental body must demonstrate that a judicial or quasi-judicial proceeding is pending or reasonably anticipated and that the requested information relates to that judicial or quasi-judicial proceeding. *See* Open Records Decision No. 551 (1990) at 2.

You say that litigation regarding the award of a grant to the Trane Company is reasonably anticipated because "two attorneys, representing different parties, have inquired in writing and by telephone as to the legal justification for [the] grant award made to the Trane Company. The content of these attorney inquiries leads this agency to believe that litigation against the State of Texas regarding this matter is imminent."

Whether litigation is reasonably anticipated for purposes of section 552.103 must be determined on a case-by-case basis. Open Records Decision No. 452 (1986). The application of section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. *See* Open Records Decision No. 518 (1989). This office has determined that the hiring of an attorney and that attorney's assertion of an intent to sue evidences reasonable anticipation of litigation under section 552.103 *See* Open Records Decision No. 555 (1990). However, here, you have not indicated that the attorneys have threatened litigation against the commission. Just the fact that attorneys are inquiring into the grant award does not provide concrete evidence that litigation is reasonably anticipated. At this point, whether these attorneys bring a lawsuit against the commission is mere conjecture. Accordingly, you may not withhold the requested information based on section 552.103 of the act.

You assert section 552.107(1) protects four documents from required public disclosure. This exception embodies the attorney-client privilege. In the Open Records Act context, the protection for attorney-client communications extends to factual information or requests for advice communicated by the client to the attorney, as well as to legal advice or opinion rendered by the attorney to the client or to an associated attorney in furtherance of the rendition of legal services to the client. Open Records Decision No. 574 (1990). We have marked the documents to which this exception applies.

You raise section 552.111, which excepts from public disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception protects only those internal

communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue. Open Records Decision No. 615 (1993) at 5. Section 552.111 does not apply to purely factual information, since such information does not reflect on the deliberative or policymaking function of a governmental body. *See id.*

You seek to apply section 552.111 to two documents because you say they are "drafts." You note that the documents are unsigned and not on letterhead. One is a letter from the Governor's Energy Office to the United States Department of Energy. The other is a proposal submitted by the Governor's Energy Office to the Department of Energy.<sup>2</sup>

Section 552.111 excepts from required public disclosure a preliminary draft of a letter or document, since the preliminary draft necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document. *See Open Records Decision No. 559 (1990).* We agree that you may withhold the two documents at issue, if they are preliminary drafts of a document, pursuant to section 552.111 of the Government Code. *See id.* In addition, we have marked portions of the other documents to which section 552.111 applies.

Finally, by telephone you explained that you no longer wish to assert that section 552.101 of the act applies to the document titled "Proposal for the Expenditure of Stripper Well Funds," which was submitted on May 20, 1992, to the United States Department of Energy by the Governor's Energy Office. You raise no other exception to the release of this document; thus, it must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Kay Guajardo  
Assistant Attorney General  
Open Government Section

KHG/JBP/rho

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<sup>2</sup>You inform us that up until 1993, the commission's State Energy Conservation Office was part of the Governor's Energy Office.

Ref.: ID# 24382

Enclosures: Marked documents

cc: Mr. William Striebe, Jr.  
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(w/o enclosures)