



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 18, 1994

Mr. Anthony C. Grigsby
Executive Director
Texas Natural Resources Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR94-443

Dear Mr. Grigsby:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 25081.

The Texas Natural Resources Conservation Commission (the "commission") has received three requests for information relating to a certain commission investigation. Generally, the requestors seek commission materials relating to activity on property located at Route 2, Box 480, Gilmer, Texas. Specifically, the requestors seek the commission's enforcement, attorney, state lead, and responsible party remediation files with respect to this property. You advise us that the commission has made some of the requested information available to the requestors. You seek, however, to withhold the remaining information, which you have submitted to us for review, claiming that sections 552.101, 552.103(a), 552.107, and 552.111 of the Government Code except it from required public disclosure.

Section 552.103(a) of the Government Code excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 (1990) at 5. A surmise that litigation will occur is not enough; there must be some concrete evidence pointing to litigation. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision Nos. 518 (1989) at 5; 328 (1982). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 (1991) at 7 (construing statutory predecessor to the APA).

You advise us that the requested information relates to an investigation for possible violations of Texas Water Code conducted pursuant to sections 26.019 and 26.136 of the Water Code, and you apparently anticipate that the investigation will culminate in a contested administrative case under the APA. *See* Water Code § 26.136(h) (providing that proceedings under section 26.136 subject to APA). Having examined the information submitted to us for review, we conclude that litigation may be reasonably anticipated. We also conclude that the submitted information relates to the anticipated litigation.

Although your letter did not identify the parties to the anticipated litigation, the documents you provided indicate who these parties may be. Some of the information you have submitted is already available to all parties to the anticipated litigation, such as correspondence between the commission and parties to the anticipated litigation and information that parties to the anticipated litigation submitted to the commission at the commission's request. Generally, when parties to litigation already have copies of the records or have inspected them pursuant to discovery or any other means, section 552.103(a) may no longer be invoked. Open Records Decision No. 597 (1991) (concluding that statutory predecessor to section 552.103 did not except basic information in offense report that was previously disclosed to defendant in criminal litigation); *see also* Open Records Decision Nos. 551 at 4; 511 at 5, 493 (1988) at 2; 349, 320 (1982). Thus, 552.103(a) of the Government Code does not allow you to withhold letters sent to the commission by parties to the anticipated litigation, but annotations written by commission employees on those letters may be withheld. We have indicated which information you may not withhold under section 552.103(a). The remaining information may be withheld from required public disclosure under section 552.103(a) of the Government Code.¹

¹We note that the applicability of section 552.103(a) ends once the litigation has concluded. *See* Open Records Decision No. 350 (1982) at 3. We also note that section 552.103(a) is a discretionary exception, so the commission may choose to release the information. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4.

You also claim that sections 552.101, 552.107, and 552.111 of the Government Code apply to your records. We will consider whether any of these provisions apply to the documents that are not protected by section 552.103. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You assert section 552.101 in conjunction with the informer's privilege. The informer's privilege has been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 (1988) at 3; 208 (1978) at 1-2. As noted above, the information at issue here has been made available to parties to the anticipated litigation such that would enable the subject of the information to ascertain the informer's identity. Accordingly, the informer's privilege aspect of section 552.101 does not apply in this instance. In addition, you have not identified any statute, constitutional provision or judicial decision that renders these documents confidential, and we are not aware of any.² Accordingly, section 552.101 of the Government Code does not apply to these remaining documents.

Section 552.107, which protects confidential attorney-client communications, does not apply to information communicated to third parties. Open Records Decision No. 574 (1990) at 5 (communications between attorney and third party are not within attorney-client privilege). All of the documents under consideration have been made available to parties that are adverse to the commission in the anticipated litigation; accordingly, none of them may be withheld under section 552.107 of the Government Code.

Section 552.111 of the Government Code excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section excepts those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policy-making processes of the governmental body at issue. Open Records Decision No. 615 (1993). The records under consideration consist of correspondence between private individuals, or correspondence between the commission and a private individual. These documents are not "interagency or intraagency" communications. Thus, section 552.111 of the Government Code does not apply to this material. Except for information excepted under section 552.103(a) as noted above, the commission must release the requested information in its entirety.

²You indicate that one of the parties who provided documents to the commission "explicitly requested that this information be kept confidential and stamped the documents as such." We note that information is not made confidential simply because the party submitting the information has requested that the information be kept confidential and marked the information as "confidential." Open Records Decision No. 479 (1987).

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,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/GCK/rho

Ref.: ID# 25081

Enclosures: Marked documents

cc: Mr. J. Patrick McLaughlin
Jenkins & Gilchrist
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202-2799
(w/o enclosures)

Mr. Harry M. Fox
American Star Travel Plaza
H & F Realty
Route 2, Box 480
Gilmer, Texas 75644
(w/o enclosures)