



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 24, 1994

Ms. Jennifer C. Smith  
Staff Attorney  
Legal Services Division  
Texas Natural Resource Conservation Commission  
P. O. Box 13087  
Austin, Texas 78711-3087

OR94-500

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 28101.

The Texas Natural Resource Conservation Commission ("TNRCC") received a request for "all notations of contacts between you and/or your office on the one hand, and John Vay, Roly Purrington, and any other member of his or their legal staffs, or any other person working for or on behalf of the Applicant from the beginning of the application process to date." You say that you have released portions of the requested information, but seek to withhold certain items based on sections 552.103, 552.107, and 552.111 of the Government Code. You also assert that parts of the requested information are not subject to the Open Records Act because they are personal notes.

As a threshold issue, we first address your contention that the requested information is not subject to the Open Records Act because they are personal notes. You explain that the information you enclosed consists of your notes and the notes of another TNRCC attorney which were taken during meetings with private attorneys and other private parties concerning an application to build a municipal solid waste landfill in Denton County. You urge that certain comments are "merely personal notes of the agency attorney made during the course of the meeting" and that these "comments were written merely for the agency attorneys' personal use."

Section 552.021 of the Government Code provides that

[i]nformation is public information if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Prior Open Records Decisions have determined that notes in the sole possession of a public officer or public employee and made by the public officer or employee solely for his or her own personal use are not public information subject to the Open Records Act. See Open Records Decision Nos. 145 (1976); 116 (1975); 77 (1975). However, information used by a public official or employee in the performance of official duties is generally public information. See Attorney General Opinion JM-1143 (1990) at 2. Thus, the notes of a public employee that were created "in connection with the transaction of official business" are public records subject to the Open Records Act. See Open Records Decision No. 626 (1994) at 2.

The attorneys' notes were created "in connection with the transaction of official business," that is, during meetings concerning an application for a permit to build a municipal solid waste landfill. Accordingly, we conclude that the notes are subject to the act under section 552.021(a)(1). We consider whether the notes are excepted from required public disclosure.

You have marked portions of the attorney notes as within section 552.103(a) of the Government Code. To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). In this instance you have made the requisite showing that the requested information relates to pending litigation for purposes of section 552.103(a). The information you have marked as protected under section 552.103(a) may therefore be withheld.<sup>1</sup>

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<sup>1</sup>In reaching this conclusion, however, we assume that the opposing party to the 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(a) (formerly section 3(a)(3)) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We 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).

Two pages of the requested notes contain information you claim is excepted from required public disclosure under sections 552.107(1) and 552.111. Section 552.107(1) excepts from public disclosure

information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

Gov't Code § 552.107(1). This exception incorporates the attorney-client privilege and generally applies to communications containing client confidences or legal advice and opinion. *See* Open Records Decision No. 574 (1990).<sup>2</sup> We find that the information contains neither client confidences or legal advice and opinion. We, therefore, conclude that you may not withhold the information based on section 552.107(1) of the Government Code.

Finally, you raise section 552.111 of the Government Code which excepts from required public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception applies to internal communications consisting of advice, recommendations, or opinions reflecting the policymaking processes of the governmental body at issue. *See* Open Records Decision No. 615 (1993).

The notes at issue are not interagency or intraagency communications; therefore, section 552.111 does not apply. Accordingly, you may not withhold the requested information based on section 552.111 of the Government Code.

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

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<sup>2</sup>We note that you marked the information as "552.107-attorney work product." Section 552.103 of the Government Code, rather than section 552.107(1), may protect from required public disclosure an attorney's work product if the requirements for that exception are met. *See* Open Records Decision No. 575 (1990) at 2.

KHG/rho

Ref.: ID# 28101

Enclosures: Submitted documents

cc: Mr. Roger D. Sanders  
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