



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 11, 1995

Mr. Gregory J. Pfeifer
Staff Attorney, Legal Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR95-925

Dear Mr. Pfeifer:

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# 30203.

The Texas Natural Resource Conservation Commission (the "commission") received two requests seeking information related to the Alcoa/Lavaca Bay Superfund Site. The first request was for the commission's "complete file pertaining to the [Alcoa/Lavaca Bay Superfund Site] located in Point Comfort, Texas," and the second was for all hazardous and solid waste and Superfund/natural resource damage assessment records maintained by the commission that relate to the "ALCOA facility and its operations and/or the mercury contamination which has been documented to exist in Lavaca bay." You state that the commission has made two requested reports available to the first requestor because they were previously disclosed to the public. We assume that the commission will make those same reports available to the second requestor. You claim that the remainder of the requested information is excepted from disclosure under sections 552.103(a), 552.107, and 552.111 of the Government Code. You have submitted samples of the documents requested. We have considered the exceptions you claimed and have reviewed the sample documents.¹

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.103(a) excepts from 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.

The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The commission must meet both prongs of this test for information to be excepted under 552.103(a).

The Governor of Texas has designated the department as one of the trustees for the state's natural resources pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, and the Clean Water Act, 33 U.S.C. § 1321(c). *See* 40 C.F.R. § 300.605.² As a trustee, the department may bring a court action to recover natural resource damages sustained as the result of an unauthorized discharge of hazardous material. *See* Nat. Res. Code § 40.107. From the documents that you have submitted, it appears that the commission has been involved in an investigation of the Alcoa/Lavaca Bay site. You state that the Office of the Attorney General is considering seeking to intervene in a pending suit filed by the federal government under CERCLA and filing a separate suit for state natural resource damages. In fact, the attorney general sent a notice of intent to sue to Alcoa in 1992. However, no lawsuit has yet been filed nor do we have any evidence that the commission has intervened in the federal lawsuit. You further state that the Environmental Protection Agency (the "EPA") has listed the Alcoa/Lavaca Bay site on the National Priorities List. You state that for sites listed on the National Priorities List, the statute of limitations for natural resource damages actions expires three years after the completion of a remedial action. *See* 42 U.S.C. § 9613(g)(1). In a letter dated April 25, 1995, you informed us that, at that time, the remedial action had not yet begun. Therefore, the commission has three years from the date the remedial action is completed to bring suit based on the damage at the Alcoa/Lavaca Bay site. Finally, you state that it is the commission's intent to sue if an agreement is not reached through negotiation. Based on these facts, we conclude that litigation is reasonably anticipated. Further, after a review of the sample

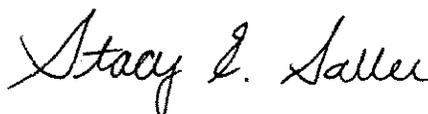
²The state trustees for natural resources also include the Texas Parks and Wildlife Department and the Texas General Land Office.

documents, we conclude that they are related to the subject matter of the potential litigation. Therefore, with the exceptions noted below, the commission may withhold the requested documents under section 552.103(a). We note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, 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).

As we have held that the commission may not withhold the documents previously disclosed to Alcoa, we must address your other claimed exceptions. We conclude that neither section 552.107 nor section 552.111 except the documents previously disclosed to Alcoa from disclosure. Open Records Decision Nos. 574 (1990) (section 552.107 does not apply to communications that are not confidential), 435 (1986) (section 552.111 waived by release of information to public). Therefore, the commission may not withhold documents previously disclosed to Alcoa.³

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 under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/KHG/rho

Ref.: ID# 30203

Enclosures: Marked documents

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³The same is true for documents that the commission has otherwise made public, as you recognize in your letter. The commission may not now withhold documents it previously disclosed to the public. See Gov't Code § 552.007; Open Records Decision No. 490 (1988).

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