



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 24, 1996

Ms. Raenell Silcox
Attorney
Resource Protection Division
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744

OR96-1002

Dear Ms. Silcox:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, and also ask for reconsideration of a previous ruling issued by this office, Open Records Letter 95-411 (1995) ("OR95-411"). Your requests were assigned ID# 34497 and ID# 39754, respectively.

The Texas Parks and Wildlife Department (the "department") has received several requests for information relating to an oil spill in or around Gum Hollow Creek, Nueces Bay, and Corpus Christi Bay, involving Koch Industries, Inc. ("Koch"). In response to the first of these requests, the department asked this office whether it could withhold the requested information under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. In OR95-411, this office concluded that certain rules provided for public access to information relating to this matter and that the department could not withhold information made public by these rules under any of the discretionary exceptions in chapter 552. With regard to information that is not specifically made available to the public through department rules, this office concluded that the department had shown that litigation was reasonably anticipated and that it could withhold the information related to this matter under section 552.103. This office found that the department could not, however, withhold information under sections 552.103, as well as sections 552.107 and 552.111, if the information had been received from or disclosed to Koch, the potential adverse party in the anticipated litigation.

In response to several more requests for information relating to this matter, the department once again urges that the information is excepted from disclosure under sections 552.103, 552.107, and 552.111. Additionally, the department asks for reconsideration of this office's ruling in OR95-411 that those documents that have been disclosed to or received from the adverse party in the potential litigation are not excepted

from disclosure. The department argues that it has exchanged numerous documents with Koch during these settlement negotiations and that requiring disclosure of this information would have a "chilling effect" on the negotiations.

Initially, we note that the documents in question arise from the department's performance of a natural resource damage assessment of an oil spill as a "trustee," pursuant to the Oil Spill Prevention and Response Act, chapter 40 of the Natural Resources Code. *See* Nat. Res. Code § 40.107. As provided by section 40.107(c)(4)-(5), the department has adopted rules governing the assessment process. *See generally* 31 T.A.C. §§ 20.1-.44. Some of these rules provide the public with an opportunity to review certain information and comment at certain stages in the process of assessing natural resource damage resulting from an oil spill. *See, e.g.*, 31 T.A.C. §§ 20.22(a)(1), .36(e)(1), .42(b), .44(b)-(e). As we concluded in OR95-411, we again find that the department may not invoke a discretionary exception under chapter 552 of the Government Code as authority to withhold information specifically made available to the public under these rules.

As to the information relating to the assessment process that is not specifically made available to the public under department rules, we must address the exceptions to disclosure that you raise. Section 552.103(a) excepts from disclosure information relating to litigation or settlement negotiations to which the state is or may be a party. A governmental body 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 Nos. 638 (1996) at 2, 551 (1990) at 4. A governmental body must meet both prongs of this test for information to be excepted under 552.103(a). Open Records Decision No. 638 (1996) at 2.

Having examined the information submitted to us for review, we conclude that litigation is reasonably anticipated and that the requested information relates to the anticipated litigation. We therefore conclude that the department may withhold the requested information under section 552.103 of the Government Code, with the exceptions noted below.

As discussed above, the department may not withhold from disclosure information that is open to the public by department rule. We also note that the applicability of section 552.103(a) for anticipated or pending litigation ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In your request for reconsideration, you argue that the department should not have to disclose information provided to it by Koch because to do so may have a "chilling effect" on the willingness of a responsible party to provide the department with

information, and thus will hinder the settlement negotiations. We believe that, in light of the statutory scheme involved in natural resource damage assessments and the unique nature of these assessments, which can result only in settlement or litigation of natural resource damage claims, we conclude that the department may withhold "[i]nformation . . . relating to . . . settlement negotiations, to which the state is or may be a party" pursuant to section 552.103(a).¹

We are resolving this matter with this 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 may not be relied upon as a previous determination 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/ch

Re: ID#s 34497, 39754

Enclosures: Submitted documents

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¹We note that, as with litigation, once the settlement negotiations are over, the information may not be withheld under section 552.103(a). We also note that any resulting final settlement agreement may not be withheld under section 552.103(a).