



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 18, 1996

Mr. Jim Phillips
Deputy Director, Office of Legal Services
Texas Natural Resource Conservation Commission
P. O. Box 13087
Austin, Texas 78711-3087

OR96-1171

Dear Mr. Phillips:

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# 40281.

The Texas Natural Resource Conservation Commission (the "commission") received the following open records request relating to a discharge of oil from a Koch Gathering Systems, Inc. ("Koch") pipeline:

Pursuant to the Open Records Act, an opportunity to inspect or copy all documents, memos, phone logs, etc. relevant to the Koch oil spill of October 8, 1994, is requested. This request would include documents maintained at your offices in Austin and Corpus Christi.

You ask whether the commission may withhold the requested information from required public disclosure based on sections 552.103, 552.107, and 552.111 of the Government Code. Specifically, pursuant to exceptions you have raised you state that:

[T]he commission wishes to withhold from disclosure all documents affiliated with the TNRCC's claim for lost natural resources because the documents consist of information relating to: pending or reasonably anticipated litigation, attorney-client privileged material, and inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the Commission.

The commission submitted representative samples of the requested information. We have considered the exceptions you claimed and have reviewed the documents at issue.

We note that the documents in question arise from the commission'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. The Governor of Texas designated the commission as one of the trustees for the state's natural resources pursuant to the Oil Spill Prevention and Response Act.¹ As a trustee, the commission may bring a court action to recover natural resource damages sustained as the result of an unauthorized discharge of oil. *See* Nat. Res. Code § 40.107; 31 T.A.C. § 20.41.

As provided by section 40.107(c)(4)-(5), the commission 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.² Therefore, we find that the commission may not invoke a discretionary exception in the Open Records Act as authority to withhold such information from required public disclosure.³

As for the information relating to the assessment process that is not specifically made available to the public under commission rules, we will consider the exceptions 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

¹The state trustees for natural resources also include the Texas Parks and Wildlife Department and the Texas General Land Office.

²For example, 31 T.A.C. §§ 20.22(a)(1) (requiring trustees to provide opportunity for public review and comment on assessment plans, restoration plans, and settlement agreements), .36(e)(1) (requiring trustees to submit a restoration project for public review and comment), .42(b) (requiring public review and comment of final settlement agreement between trustees and responsible person), .44(b) (prohibiting trustees from executing any document which relieves responsible person from liability for natural resource damages until public has had opportunity to review and comment on document), .44(c) (requiring trustees to provide opportunity for public review and comment when trustees select assessment procedures and protocols for negotiated, expedited, or comprehensive assessment, when restoration plan is proposed, and prior to certification of completion of restoration plan), .44(d) (requiring trustees to invite members of public to participate in development and design of equivalent resource plan, and allowing member of public to request a hearing on said plan), .44(e) (permitting trustees to invite public to participate in determining whether assessment is necessary).

³The rules require, and in some cases permit, public review of certain information, including an equivalent resource plan, an assessment plan, a restoration plan, settlement agreements, restoration projects, and any document that relieves the responsible party from liability. We believe that these rules control access to particular information pertaining to the oil spill.

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.

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, and having examined the information submitted to us for review, we conclude that you have demonstrated the applicability of section 552.103 to the requested information. 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 letter, you also argue that Koch has voluntarily provided to the trustees the submitted records as part of the cooperative stance it has taken in the interest of furthering settlement negotiations. Generally, when the opposing parties in anticipated litigation have seen or had access to requested information, there is no justification for withholding that information from the public pursuant to section 552.103(a). Open Records Decision Nos. 597 (1991), 349 (1982). However, you assert that if the commission cannot withhold the documents provided by Koch, the end result may be the loss of cooperation and the consequent loss of an opportunity to settle the claim. You argue that the commission 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 commission with information and thus hinder the settlement negotiations. Therefore, we conclude that the commission may withhold "[i]nformation . . . relating to . . . settlement negotiations, to which the state is or may be a party" pursuant to section 552.103, with the exception that the commission may not withhold from disclosure information that is open to the public by commission rule.⁴

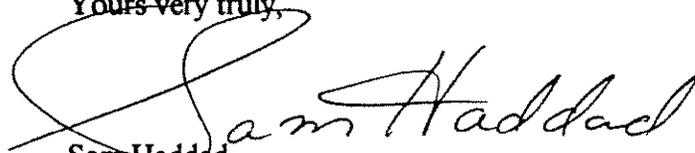
We are resolving this matter with an informal letter ruling rather than with a published open records decision.⁵ This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous

⁴We 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).

⁵As we resolve your request under section 552.103(a), we need not address your claimed exceptions under sections 552.107 and 552.111 at this time.

determination regarding any other records.⁶ If you have questions about this ruling, please contact our office.

Yours very truly,



Sam Haddad
Assistant Attorney General
Open Government Section

SH/ch

Ref: ID# 40281

Enclosures: Submitted documents

cc: Ms. Margaret Rising
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⁶In reaching our conclusion here, we assume that the "representative samples" submitted to this office are truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). 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.