



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 26, 1996

Mr. John Riley
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR96-2253

Dear Mr. Riley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 37459.

The Texas Natural Resource Conservation Commission (the "commission") received a request for four categories of information relating to pathogenic viruses possibly present in wastewater effluent, and other information. You state that you have released much of the requested information responsive to the first three categories of information,¹ but assert that ten documents or portions of documents are excepted from required public disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.

You assert that these ten documents or portions of documents were generated in preparation for or in connection with a pending commission matter, styled *In the Matter of the Application of Lake LBJ Municipal Utility District No. 2 For Waste Discharge Permit No. 13660-001*; TNRCC Docket No. 93-1307-UCR; SOAH Docket No. 582-95-1102, and,

¹You state that the commission "does not generate or maintain the specific information requested in [category] 4 (a list of non-compliant facultative lagoon systems)" and have informed the requestor that "he may request information on a particular lagoon facility by name or permit number." The Open Records Act does not require the creation or preparation of new information. See Open Records Decision Nos. 572 (1991), 555 (1990), 452 (1986). However, a governmental body must make a good faith effort to relate the request to information which it holds. Open Records Decision No. 561 (1990). In this instance, we agree that you have complied with your obligation under the Open Records Act and need not respond further to this portion of the request.

therefore, should be excepted from disclosure as attorney work product. This office recently issued Open Records Decision No. 647 (1996), holding that a governmental body may withhold information under section 552.111 of the Government Code as attorney work product if the governmental body can show (1) that the information was created for civil trial or in anticipation of civil litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a civil lawsuit is filed, and (2) that the work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 (1996) at 5.

With regard to documents (1) through (5), you seek to withhold only a commission attorney's handwritten notes in the margins of certain professional articles. You state that these notes were used in preparation for trial. We agree that these notes tend to reveal an attorney's "mental processes, conclusions, and legal theories" and, therefore, may be withheld as attorney work product under section 552.111. The remainder of the articles must be released to the requestor.

We also agree that document (6), a commission attorney's outline "used in preparation for oral arguments in a prehearing conference," and documents (7) through (9) and a portion of document (10), a commission attorney's notes used to cross-examine witnesses or to prepare written pleadings, tend to reveal an attorney's "mental processes, conclusions, and legal theories" and, therefore, may be withheld as attorney work product under section 552.111 in their entirety.

In summary, the commission may withhold all the information it seeks to withhold under section 552.111 of the Government Code as attorney work product. However, the commission may choose to release all or part of the information that is not otherwise confidential by law. Gov't Code § 552.007. As we resolve this matter under section 552.111, we need not address the other exceptions you have raised.

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

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long horizontal flourish extending to the right.

Todd Reese
Assistant Attorney General
Open Records Division

RTR/rho

Ref: ID# 37459

Enclosures: Submitted documents

cc: Mr. Lewis E. Reioux, Jr.
Route 1, Box 45R
Marble Falls, Texas 78654
(w/o enclosures)