



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 29, 1998

Mr. Kevin McCalla
Director, Legal Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR98-1087

Dear Mr. McCalla:

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# 115269.

The Texas Natural Resource Conservation (the "commission") received a request for "all records pertaining to the status of, or activities related to, the Good Faith Offer to Perform a Remedial Investigation/Feasibility Study" for the Materials Recovery Enterprises, Inc. site in Ovalo, Texas. You raise no exception to disclosure on behalf of the commission and make no arguments regarding the proprietary nature of the requested information. You request our decision as to whether the requested information is excepted from disclosure. You have submitted the requested information to this office for review.

Pursuant to section 552.305 of the Government Code, we notified the attorney for Materials Recovery Enterprises, Inc. ("MRE") of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances).

MRE did not respond to our notice; therefore, we have no basis to conclude that this company's information is excepted from disclosure. *See* Open Records Decision Nos. 639

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.² 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.³ 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.⁴

However, 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 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.

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

³For 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).

⁴The 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.