Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 1, 1998

Mr. Paul C. Sarahan
Acting Director
Litigation Support Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR98-2344

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 118401.

The Texas Natural Resource Conservation Commission (the "commission") received a request for information regarding Aviall Services Inc.'s ("Aviall") Forest Park Facility in Dallas. You indicate that the commission has made some of the requested information available to the requestor. You contend, however, that the remaining information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed a representative sample of the documents at issue.[1]

Section 552.103(a) of the Government Code excepts from disclosure information relating to litigation to which the state is or may be a party. 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 at 4 (1990). The commission must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that there is an enforcement action pending against Aviall which may be resolved through settlement, administrative hearing, or trial. The documents at issue under section 552.103(a) are related to the pending enforcement action. Therefore, the commission

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[1]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.

may withhold most of those documents under section 552.103(a). We note, however, that several of these documents were sent to or received from Aviall. Once the opposing party in litigation has seen or had access to documents, there is no justification for withholding them from disclosure 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).

Section 552.107(1) of the Government Code protects information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects the client's confidential communications to the attorney and the attorney's legal advice or opinions. ORD 574 at 5-7. Section 552.107(1) does not, however, protect purely factual information. *Id.* You have submitted several documents that you claim are excepted from disclosure under section 552.107(1). We have reviewed these documents and marked the information that the commission may withhold under section 552.107(1).

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath,* 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. ORD 615 at 4-5. We have marked the portions of the submitted internal memoranda that the commission may withhold from disclosure pursuant to section 552.111.

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,

Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 118401

Enclosures: Marked documents

cc: Mr. Louis S. Zimmerman
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(w/o enclosures)