



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 16, 1998

Ms. Margaret Hoffman, Director
Environmental Law Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR98-2441

Dear Ms. Hoffman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 118802.

The Texas Natural Resource Conservation Commission ("TNRCC") received a request for all "materials prepared during or after July 1997 concerning the Gulf Metals state superfund site a/k/a the Makawa site, located at Makawa and Almeda-Genoa Road in Houston, Harris County, Texas." You indicate that the TNRCC will release some of the requested information. You claim, however, that the remaining responsive information is excepted from required public disclosure by sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the sample documents that you have submitted, Attachments C, D, and E.¹

You argue that the records in Attachment D are excepted from disclosure by section 552.111 and that the information in Attachments C and E is protected by both sections 552.107 and 552.111. Section 552.107(1) excepts 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 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107

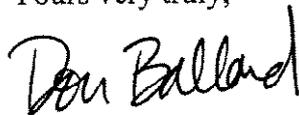
¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988); 497 (1988). This open records letter does not reach, and therefore does not authorize 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.

protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.*; see Tex. R. Civ. Evid. 503(a)(5) (a communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services). We have reviewed the sample documents in Attachments C and E. We find that portions of those pages and some documents in their entirety within Attachments C and E may be withheld under section 552.107. We have marked the information that may be withheld. Because we make a determination under section 552.107 for Attachment C, we do not address your additional argument under section 552.111 for this information. We do not believe that section 552.111 would furnish any greater protection from public disclosure than that already provided by the attorney-client privilege under section 552.107. Open Records Decision No. 615 at 4-5 (1993) (purely factual information severable from opinion is not protected by section 552.111).

Section 552.111 excepts "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. *Id.* at 4-5. While portions of Attachments D and E pertain to the policy functions of TNRCC, some of the information contained in these documents is purely factual. We have marked those portions of the documents that may be withheld from required public disclosure under section 552.111. TNRCC may withhold the information we have marked under sections 552.107 or 552.111. The remaining portions of information must be released.

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,



Don Ballard
Assistant Attorney General
Open Records Division

Ref: ID# 118802

Enclosures: Marked documents

cc: Mr. Thomas D. Boyle
Gibson, Dunn & Crutcher, L.L.P.
1717 Main Street, Suite 5400
Dallas, Texas 75201-7390
(w/o enclosures)