



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

October 26, 1998

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

OR98-2489

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under the Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 118888.

The Texas Natural Resource Conservation Commission (the "commission") received the following open records request:

A copy of each document wherein the TNRCC has set forth its policy concerning what constitutes a person's inability to pay an enforcement penalty. Included in this request is any information related to guidelines used by TNRCC financial staff for determining inability to pay, any decision rendered by the Commission or an Administrative Law Judge concerning inability to pay, and any other document addressing inability to pay.

In response to the request, you submit to this office for review a representative sample of the information which you assert is responsive.<sup>1</sup> You claim that the requested information is excepted from required public disclosure based on sections 552.101, 552.103, and 552.111 of the Government Code. We have considered the arguments and exceptions you raise and reviewed the submitted information.

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<sup>1</sup>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.

Initially, we note that in your letter to the requestor you explain that certain information does not exist, some documents marked as Exhibit A will be released, and a portion of the request is overly broad and requires formatting of the information. We first note that the act only applies to information in existence and does not require a governmental body to prepare new information, and based on your representation that the commission has no responsive documents with regard to this portion of the request, we conclude that the commission need not respond to this aspect of the request. *See* Open Records Decision Nos. 605 (1992), 445 (1986). Concerning the portion of the request which the commission has characterized as "overly broad," we note that a governmental body must make a good faith effort to relate a request to information which it holds, and if a request for information is unclear, a governmental body may ask the requestor to clarify the request. Gov't Code § 552.222(b); *see also* Open Records Decision No. 561 at 8 (1990). However, as for the commission's assertion that certain requested information is "not organized in the manner [the requestor] requested," we note that chapter 552 does not require the preparation of information in the form requested by a member of the public, unless the information exists in an electronic format. *See* Gov't Code § 552.231; *see also* section 552.228 (regarding information in electronic format); Open Records Decision No. 362 (1983) (Open Records Act does not require governmental body to make available information which does not exist).

We next consider the applicability of the claimed exceptions for the submitted information. To show that section 552.103(a) is applicable, the commission must demonstrate 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). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the commission must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982).

In this situation, you explain that "[i]n addition to the case associated with Attachments 'C', 'D', and 'E', many of the files are active cases in litigation. Further, if a case from a file is not in active litigation, it is a pending enforcement proceeding indicating that litigation is reasonably pending." However, you have provided no evidence that there is pending or anticipated litigation at this time. Open Records Decision No. 518 at 5 (1989) (governmental body must show that litigation involving specific matter is realistically contemplated). In this instance, you have not made the requisite showing that the requested information relates to anticipated or pending litigation for purposes of section 552.103(a). Therefore, the requested records may not be withheld under section 552.103 of the Government Code.

We next consider whether section 552.111 protects any of the information submitted as Exhibit C. 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 *Texas Department of Public Safety v. Gilbreath*, 842 .W.2d 408 (Tex. App.--Austin 1992, no writ), and concluded that it excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Open Records Decision No. 615 at 5-6 (1993)*. In addition, 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. You explain that Exhibit C "exemplifies memoranda between TNRCC Office of Financial Assurance and Enforcement/Litigation staff in that the memoranda contain recommendations of an individuals ability to pay a penalty." Based on your arguments and review of the information, we conclude that certain information which we have *marked* in Exhibit C may be withheld under section 552.111.

Finally, we consider to what extent section 552.101 of the Government Code excepts any of the submitted information. Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses common-law privacy. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, and it is of no legitimate concern to the public. *Id.* at 683-85. This office has previously concluded that financial information ordinarily satisfies the first requirement of common-law privacy in that it constitutes highly intimate or embarrassing facts about the individual.<sup>2</sup> See *Open Records Decision No. 373 (1983)*. However, most of the submitted information appears to relate to corporations or governmental bodies which do not have a protected common-law privacy interest in financial information. *Open Records Decision Nos. 624 (1994), 192 (1978) at 4* (right of privacy protects feelings of human beings, not property, business, or other monetary interests).

Since a corporation or a business entity may not claim common-law privacy, we conclude that most of the information at issue is not excepted from required public disclosure pursuant to section 552.101 and common-law privacy. See *Open Records Decision Nos. 620 (1993)* (financial information concerning individuals is excepted by common-law privacy, but companies and corporations do not have right of privacy), *Open Records Decision No. 600 (1992)*. Furthermore, we also note that to the extent the information relates

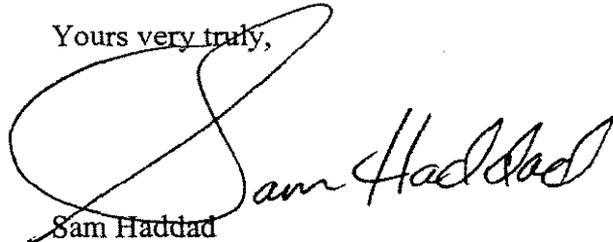
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<sup>2</sup>Whether the public has a legitimate interest in such information, however, must be determined on a case-by-case basis. *Open Records Decision No. 626 (1994) at 3*.

to the amount of a debt owed to the commission the information is of legitimate public concern, and should be released. *See* Open Records Decision Nos. 525 (1989) (amount of debt to public hospital, together with names of debtors and dates of delinquency, is not excepted by common law privacy), 385 (1983).<sup>3</sup> *Cf.* Open Records Decision No. 385 (1983) (appropriate to make distinction between background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body).

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,



Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/mjc

Ref: ID# 118888

Enclosures: Submitted documents

cc: Mr. Leonard H. Dougal  
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(w/o enclosures)

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<sup>3</sup>We advise the department to exercise caution in releasing confidential information. *See* Gov't Code § 552.352 (the distribution of confidential information is a criminal offense).