



June 1, 1999

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

OR99-1486

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 124867.

The Texas Natural Resource Conservation Commission (the "commission") received an open records request for various documents pertaining to a spill of raw sewage into Brushy Creek in Williamson County. You state that most of the requested information will be released to the requestor. You seek to withhold certain other documents, a representative sample of which you have submitted to this office, pursuant to sections 552.107(1) and 552.111 of the Government Code.

You first contend that the contents of Enclosure No. 3A may be withheld from the public pursuant to section 552.107(1), which protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. After reviewing the contents of Enclosure No. 3A, we agree that portions of these documents may properly be withheld from the public pursuant to section 552.107(1). We have marked the portions of these documents the commission may withhold under this exception.

You next contend that the documents you submitted as Enclosure No. 3B are excepted from required public disclosure pursuant to section 552.111 of the Government Code as attorney work product. The first requirement that must be met to consider information "attorney work product" is that the information must have been created for trial or in anticipation of litigation. You state that all of the records contained in Enclosure No. 3B were created by

an attorney in preparation for and during the course of a commission enforcement action against the City of Austin. We therefore conclude that you have met the first requirement. The second requirement that must be met is that the work product “consists of or tends to reveal the thought processes of an attorney in the civil litigation process.”¹ Open Records Decision No. 647 at 4 (1996). After reviewing the contents of Enclosure No. 3B, we conclude that all of these records meet this standard. Accordingly, the commission may withhold Enclosure No. 3B in its entirety as attorney work product under section 552.111.

Finally, you contend that the contents of Enclosure No. 3C may be withheld from the public as “interagency or intra-agency memoranda” and draft documents protected under section 552.111. Section 552.111 excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity’s policymaking process.² Open Records Decision No. 615 at 5 (1993). The purpose of this section is “to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref’d n.r.e.) (emphasis added). In Open Records Decision No. 615 at 5, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency’s policymaking functions do not encompass routine internal administrative and personnel matters . . . [Emphasis in original.]

We agree that the memoranda, or portions thereof, contained in Enclosure No. 3C consist of information protected by section 552.111. We have marked these documents accordingly.

Additionally, in Open Records Decision No. 559 (1990), this office held that a preliminary draft of a document *that is intended for release in a final form* necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document and as such may be withheld pursuant to the predecessor of section 552.111. The draft documents before us directly pertain to policy matters concerning the commission. It is not clear to this office, however, whether the commission intends to publicly release all of these documents in their final form. To the extent that these documents in fact are released to the public in their final form, we conclude that the commission may withhold

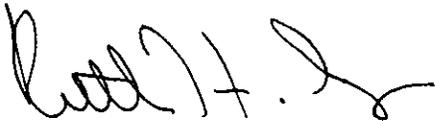
¹The attorney work product privilege generally does not extend to facts obtained by the attorney. *Id.* and authorities cited therein.

²Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 5.

these and similar draft documents in their entirety pursuant to section 552.111. In the event that any of the draft documents were not intended for eventual public release, we have marked the portions of the drafts that consist of "advice, opinion, or recommendation" that the commission may withhold pursuant to section 552.111; the remaining portions of such documents must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision.³ 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.

Sincerely,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/RWP/eaf

Ref.: ID# 124867

encl. Marked documents

cc: Mr. Mike Davis
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(w/o enclosures)

³In reaching our conclusions 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 No. 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.