



June 30, 1999

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

OR99-1811

Dear Ms. Hoffman:

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# 125254.

The Texas Natural Resource Conservation Commission (the "commission") received a request for information regarding an American Ecology Environmental Services Corporation facility. Although you have released the public information in your files, you claim that the remaining documents are excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted sample of information.²

First, you contend that documents submitted as Enclosure No. 3B are confidential under section 154.073 of the Civil Practice and Remedies Code. Section 154.073 provides in part as follows:

¹In the future, we suggest that, instead of submitting duplicate copies with different exceptions asserted and marked on each copy, the better practice would be to submit one copy with the different exceptions asserted for the information labeled on that one copy. This would help our review of the documents in that we will not have to review the same documents multiple times.

²In 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.

(a) . . . , a communication relating to the subject matter of any civil or criminal dispute made by participant in an alternative dispute resolution procedure, . . . , is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential

You explain that the submitted documents are communications made by parties who were involved in mediation to settle a lawsuit that was pending at the time the communications were created. We agree that the documents in Enclosure No. 3B are confidential under section 154.073 of the Civil Practice and Remedies Code.

Next, you contend that the documents in Enclosure Nos. 3A, 3C, and 3D are excepted from public disclosure by 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. Open Records Decision No. 574 at 5 (1990).

Section 552.111 excepts “an interagency or intra-agency 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. 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).

Generally, 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. Yet, where a document is a genuine preliminary draft that has been released or is intended for release in final form, factual information in that draft which also appears in a released or releasable final version is excepted from disclosure by section 552.111. Open Records Decision No. 559 (1990). However, severable factual information appearing in the draft but not in the final version is not excepted by section 552.111. *Id.*

After reviewing the information submitted under these claimed exceptions, we agree that most of the information is excepted by sections 552.107 and 552.111. We have marked the factual information in Enclosure Nos. 3A, 3C, and 3D that is not excepted by either of these sections and therefore must be released.

Lastly, you assert that information in Enclosure Nos. 3E and 3F is attorney work product excepted by section 552.111. Section 552.111 also excepts from public disclosure attorney work product once the litigation has concluded. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996).

You indicate that the information at issue was gathered or prepared in anticipation of an enforcement action by the commission. We find that you have demonstrated in this case that the documents at issue were created in anticipation of litigation. Thus, you have established the applicability of both parts of the first prong of the work product test.

The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. We have reviewed your arguments and find that you have established the second prong of the work product test. You may withhold most of the submitted information in Enclosure Nos. 3E and 3F as attorney work product under section 552.111.

However, this office has stated that the work product privilege under section 552.111 does not extend to "facts an attorney may acquire." Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 n.2 (Tex. 1991)). Moreover, the privilege does not protect memoranda prepared by an attorney that contain only a "neutral recital" of facts. See *Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686, 687 (Tex. App.--Houston [1st Dist.] 1990, no writ); see generally *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994) (request for district attorney's entire file too broad). You must release the information we have marked as the work product privilege does not extend to basic facts.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Sincerely,

A handwritten signature in cursive script, appearing to read "Yen-Ha Le".

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref.: ID# 125254

Encl.: Marked documents

cc: Mr. Charles E. Southerland, P.E.
Vice President
Entrix, Inc.
5252 Westchester, Suite 250
Houston, Texas 77005
(w/o enclosures)