



January 10, 2000

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

OR2000-0090

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# 130959.

The Texas Natural Resource Conservation Commission ("TNRCC") received a request for various information pertaining to the Baldwin Waste Oil State Superfund Site. You indicate you will make available the records that TNRCC believes to be public information; thus, we assume you have released such information to the requestor. You have provided for our review additional information that is responsive to the request, marked as exhibit "B." You assert the information in exhibit "B" is excepted from public disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have reviewed the information you have submitted and considered the exceptions you assert.

Section 552.107(1) excepts information from disclosure if it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct. This exception does not apply to all client information held by a governmental body's attorney; rather, it excepts from public disclosure only "privileged information," *i.e.* communications made to the attorney in confidence and in furtherance of rendering professional services or that reveal the attorney's legal opinion or advice. Open Records Decision Nos. 589 at 1 (1991), 574 at 3 (1990), 462 at 9-11 (1987). Information gathered by an attorney as a fact-finder, purely factual information, and the factual recounting of events including the documentation of calls made, meetings attended, and memoranda sent, are not excepted from disclosure by section 552.107(1). Open Records Decision No. 574 (1990). Section 552.107(1) may except from disclosure notes in an attorney's client file if they contain confidences of the client or reveal the opinions, advice, or recommendations that have been made or will be made to the client or associated attorneys. Open Records Decision No. 574 at 6 (1990).

You explain the documents you have submitted for our review consist of nine e-mail communications between TNRCC staff and TNRCC attorneys. You have identified each staff member and attorney. You state that all of the handwritten notes on the e-mails were made by an attorney. Based on these representations, our review of the documents indicates that most of the documents consist of either client communications made to an attorney in furtherance of rendering professional services, or communications from an attorney that reveal the attorney's legal opinion or advice. We have marked the information you may withhold pursuant to section 552.107(1). For three of the documents, however, we do not agree that certain information is privileged, in that the information is purely factual and does not appear to reveal any client confidence.

As to the factual information that is not excepted by section 552.107, you also assert section 552.103 of the Government Code. To show that section 552.103(a) is applicable, TNRCC must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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). You do not indicate that litigation is pending. To demonstrate that litigation is reasonably anticipated, TNRCC must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You advise the subject matter of the documents relates to a site contaminated with hazardous substances, and that TNRCC is entitled to pursue a cost recovery action against all parties responsible for such contamination. The request additionally indicates an investigation of the site is pending. You also explain that TNRCC is required to pursue litigation "against non-compliant responsible parties" under the Solid Waste Disposal Act. See Health & Safety Code §§ 361.188, 361.197. We thus conclude that litigation is reasonably anticipated in this instance. We additionally find the factual information at issue relates to the reasonably anticipated litigation for the purposes of section 552.103(a). *Texas Legal Found.*, 958 S.W.2d at 483. The information may, therefore, be withheld pursuant to section 552.103. We note, however, that if any opposing party in the anticipated litigation has seen or had access to the information at issue, there is no section 552.103(a) interest in withholding such information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Because we make a determination under sections 552.103 and 552.107, we do not address your section 552.111 assertion. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

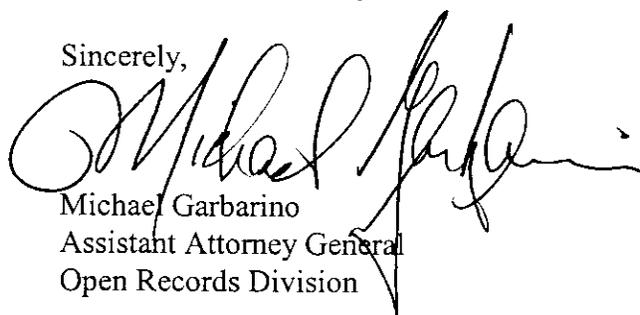
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino". The signature is written in a cursive style and is positioned above the typed name and title.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/jc

Ref: ID# 130959

Encl. Submitted documents

cc: Mr. Robert Renbarger
Fritz, Byrne & Head
98 San Jacinto Boulevard, Suite 2000
Austin, Texas 78701-4286
(w/o enclosures)