



July 14, 2000

Mr. Kevin McCalla  
Director  
General Law Division  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2000-2650

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137172.

The Texas Natural Resource Conservation Commission (the "commission") received a request for the "renewal/major amendment of hazardous waste Permit No. HW-50186 and renewal/major amendment of compliance Plan No. CP-50186." You state that you have released part of the requested documents. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.110, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code requires withholding, *inter alia*, information made confidential by statute. Section 382.041(a) of the Health and Safety Code provides in part, with exceptions which do not appear to apply here, that "a member, employee, or agent of the commission may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted." Open Records Decision No. 652 (1997) ruled, however, that if the commission seeks to withhold information from disclosure under section 382.041, it must seek the decision of this office under the provisions of chapter 552 of the Government Code, the Texas Public Information Act. If the information was identified as confidential when it was submitted to the commission, this office will permit withholding the information to the extent a *prima facie* case is made that the information is a "trade secret." *Id.*

You state that pursuant to section 552.305 of the Government Code the commission has not taken a position on whether the portions of the requested information marked confidential are indeed confidential under the Health and Safety Code section 382.041(a) or section 552.110 of the Government Code. Gov't Code § 552.305(c). However, because the property

and privacy rights of third parties may be implicated by the release of the requested information, the commission notified Phillips 66 whose information is responsive to the request. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

In their response, Phillips 66 states that the confidential documents included in the commission's notification that they received were not part of either HW-50186 or CP-50186. Phillips 66 states that the documents that they received relate to Permit No. HW-50256, a permit which has been voided. You informed us that the commission submitted the same set of documents to Phillips 66 as were submitted to this office. Therefore, because the submitted documents marked confidential are not responsive to the request, the documents must not be released.

Furthermore, the commission did not submit the responsive documents marked confidential that relate to HP-50186 and CP-50186 to this office.<sup>1</sup> Gov't Code § 552.301(e)(D) (governmental body must submit a copy of the specific information requested). Therefore, we have no basis for finding the documents confidential. When a governmental body fails to comply with section 552.301, the information is presumed public. Gov't Code § 552.302. Thus, we have no choice but to order the information released per section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

Next, you assert that the draft documents and notes are excepted from public disclosure pursuant to section 552.111. 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." Gov't Code § 522.111. 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. The draft of a document that has been released or is intended for release in final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document, and may therefore be withheld under section 552.111 of the Government Code. See Open Records Decision No. 559 (1990). An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such

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<sup>1</sup> We also note that Phillips 66 did not present any arguments asserting the confidentiality of documents relating to either HW-50186 or CP-50816.

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.*

You state that various responsive documents are draft documents and are excepted from public disclosure because they reveal the opinion and recommendation of the drafter or the staff member reviewing the draft. You state that if a final form of the draft existed, the final form was released to the public. You state that in the cases where the draft form never reached final form, the document was never released to the public. After reviewing the submitted documents that the commission marked as excepted under section 552.111, we find that these documents do reflect advice, opinion, and recommendation. However, we find that the submitted draft documents contain factual information. We have marked that factual information. However, you have not indicated whether final forms of the submitted draft documents exist and were released. Therefore, if the marked factual information also appears in the document's final form that was released to the public, this factual information does not have to be released. Otherwise, if the draft document was never released as a final document, this factual information has to be released. You may withhold the remainder of the draft documents pursuant to section 522.111.

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).

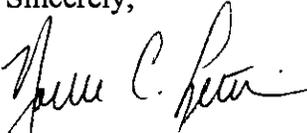
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

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,



Noelle C. Letteri  
Assistant Attorney General  
Open Records Division

ncl/nc

Ref: ID# 137172

Encl. Submitted documents

cc: Tim Moss  
City of Sweeny  
P.O. Box 248  
Sweeny, Texas 77480  
(w/o enclosures)

Robert A. Ridge  
General Manager  
Sweeny Refinery & Petrochemical Complex  
P.O. Box 866  
Sweeny, Texas 77480