



March 6, 2001

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

OR2001-0871

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144699.

The Texas Natural Resource Conservation Commission (the "commission") received a request for 15 categories of information concerning air contaminant emissions in the Beaumont/Port Arthur area and, specifically, from the Huntsman Petrochemical Company's Port Arthur plant. You indicate that much of the responsive information will be made available to the requestor. You claim, however, that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code. You have submitted representative samples of the documents you seek to withhold as enclosures 13-19. We have considered the exceptions you claim and reviewed the submitted information.¹

Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1)

¹We 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.

release of the information would interfere with the detection, investigation, or prosecution of crime.” Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. Open Records Decision No. 474 at 4-5 (1987).

You state that some of the requested items consist of material and testimony that were provided by the commission’s Special Investigations Unit to a Grand Jury for the United States District Court for the Eastern District of Texas, which subsequently indicted the targets of the investigation. In Open Records Letter No. 99-3337 (1999), this office concluded that the commission could withhold this very same information from disclosure under section 552.108. Based on your representation that sentencing is still pending in that case, we believe that release of this information would interfere with the prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.–Houston[14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 216 (1978). Therefore, you may continue to withhold all of the material and testimony provided by the commission’s Special Investigations Unit to the Grand Jury under section 552.108(a)(1) of the Government Code.²

You next claim that the responsive information on the civil side of the commission, submitted as enclosures 13-19, may be withheld from disclosure. First, you contend that enclosures 13, 14, 15, 16, and 18 are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

.....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

²Because we conclude that the Special-Investigations-Unit information may be withheld under section 552.108, we need not address your other claimed exceptions at this time.

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing 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). The commission must meet both prongs of this test for information to be excepted under 552.103(a).

You state that there is currently an enforcement action pending against Huntsman Petrochemical Company's facility in Port Arthur, which may only be resolved through settlement, administrative hearing, or trial. See Open Records Decision No. 588 (1991) (contested case under the Administrative Procedure Act, Gov't Code ch. 2001, is litigation for purposes of section 552.103 of the Government Code). You state that the information you wish to withhold is relevant to the pending enforcement actions and includes internal commission documents, such as enforcement referral documents, inspection reports, violation summaries, and penalty calculations, among other things. You claim that disclosure of this information could jeopardize the commission's resolution of the enforcement action against the Huntsman Petrochemical Company. You also specifically argue that the notes drafted by commission attorneys in anticipation of settlement or litigation should be withheld under section 552.103(a). Based on our review of the submitted documents, we agree that they relate to the pending enforcement action. *Texas Legal Found.*, 958 S.W.2d at 483. Therefore, the commission may withhold the documents in enclosures 13, 14, 15, 16, and 18 under section 552.103(a) of the Government Code.

You next assert that enclosure 17 is protected from disclosure by the attorney-client privilege under section 552.107 of the Government Code. 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 552.107(1) does not except purely factual information from disclosure. *Id.* Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5. We find that most of the information in enclosure 17 reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions. Some of the submitted information, however, is purely factual and must be released. We have marked the information that you may withhold under section 552.107 of the Government Code.

You next claim that the information contained in enclosure 19 may be withheld under the internal memorandum exception in section 552.111 of the Government Code. Section 552.111 excepts from disclosure “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 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. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, No. 03-00-00219-CV, 2001 WL 23169, at * 5 (Tex. App.—Jan. 11, 2001, no pet. h.). 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. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.* at * 6-7; ORD 615 at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). While most of the submitted documents in enclosure 19 pertain to the policy functions of the commission, some of the information is purely factual. We have marked those portions of the documents that may be withheld from disclosure under section 552.111 of the Government Code. The remaining information in enclosure 19 must be released.

To summarize, you may continue to withhold the material and testimony that was provided by the commission’s Special Investigations Unit to the Grand Jury under section 552.108. You may withhold all of the documents in enclosures 13, 14, 15, 16, and 18 under section 552.103. You may withhold some of the information in enclosure 17, which we have marked, under section 552.107. You may withhold some of the information in enclosure 19, which we have marked, under section 552.111. All of the remaining information must be released to the requestor.

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Stephen P. Agan
Assistant Attorney General
Open Records Division

SPA/seg

Ref: ID# 144699

Encl. Submitted documents

cc: Ms. Ashley J. Brown
Haynes & Boone, L.L.P.
901 Main Street, Suite 3100
Dallas, Texas 75202-3789
(w/o enclosures)