



July 20, 2001

Mr. Duncan C. Norton
General Counsel
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711

OR2001-3164

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149671.

The Texas Natural Resource Conservation Commission (the "commission") received a request for "any communications directed to the TNRCC Commissioners concerning [Docket No. 2001-0352-WR] regardless of whether those communications actually reached the Commissioners or whether they were intercepted by the clerk or any other TNRCC employee." You inform us that the commission has released to the requestor most of the documents coming within the ambit of the request, including all pleadings and filings retained in the commission's Chief Clerk's Office. You contend that the remaining requested information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.

You have submitted to our office as responsive to the request the following documents: Attachment 1, consisting of three copies of a May 7, 2001, memorandum¹ from the commission's Office of General Counsel; Attachment 2, consisting of two pages of handwritten notes prepared by an assistant general counsel; and Attachment 3, consisting of nine otherwise public documents that contain counsel's handwritten notations.² You assert that the information at issue is attorney work product excepted from disclosure under section 552.111 of the Government Code. See Open Records Decision No. 647 at 2-3 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749 (Tex. 1991)). Section 552.111 of the Government Code excepts from required public disclosure:

¹We agree with your contention that to the extent the memorandum contains information pertaining to other commission matters, the memorandum is not responsive to the request.

²You indicate that all of the documents contained in Attachment 3 have been released to the requestor without the handwritten notations.

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This office has stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must show that the material 1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See id.*

When showing that the requested documents were created in anticipation of litigation for the first prong of the work product test, a governmental body's task is twofold. The governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances 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. *See id.* at 5.

You state that the information at issue was collected and prepared by general counsel in connection with a hearing request concerning the amendment application of Guadalupe-Blanco River Authority. You explain that the hearing request was to be considered at a commission meeting, at which time the commissioners would determine whether that request warrants a contested case hearing. You further inform us that

the probability that this case will be litigated either in a contested case proceeding under the APA or in court is high. The memoranda and preparation notes relate squarely to the most likely litigated issue, i.e. whether the hearing requests demonstrate affected person status and warrant a contested case hearing. The Commission has a good faith belief that there is a substantial chance that litigation will ensue from these hearing requests and [the general counsel's] recommendations to the Commissioners were made in anticipation of the possibility of that litigation.

Based on the above representations and our review of the information at issue, we conclude that you have met the first prong of the work product test. *See also* Open Records Decision Nos. 588 (1991), 301 (1982) (contested case under Administrative Procedure Act, Government Code chapter 2001, constitutes "litigation").

We now consider whether the information reveals the attorney's mental processes, conclusions and legal theories. Having reviewed the information and your arguments, for the bulk of the information, we conclude that the information reveals attorney mental impressions, conclusions, and strategy. However, some of the entries in the memoranda you submitted as Attachment 1 consist merely of a listing of the hearing request as an agenda item, and as such may not be withheld as attorney work product or any of the

other exceptions you have raised. *See Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.--Houston [1st Dist.] 1990, no writ); Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning*, 818 S.W.2d at 750 n.2) (purely factual information not protected as work product).

We have marked the information in Attachment 1 that the commission must release to the requestor. However, based on your representations and our review of the documents at issue, we agree that the remaining information at issue constitutes attorney work product excepted from disclosure under section 552.111. Accordingly, the commission may withhold Attachments 1, 2, and 3 as attorney work product under section 552.111, except as discussed above.³

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).

³Because we resolve your request under section 552.111, we need not address the applicability of the other exceptions you raised.

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/RWP/sdk

Ref: ID# 149671

Enc. Submitted documents

c: Mr. Stuart N. Henry
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(w/o enclosures)