



August 20, 2001

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

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

OR2001-3664

Dear Madam/Sir:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150355.

The Texas Natural Resource Conservation Commission (the "commission") received a request for all documents related to a specified application for an amendment to a specified Certificate of Adjudication. You state that you will make available to the requestor all of the documents that you believe are public information. The Executive Director submitted a set of documents and the General Counsel submitted a separate set of documents labeled Attachments C, D, and E. You claim that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

We note at the outset that section 552.022 of the Government Code makes certain information public, unless it is expressly confidential under other law. One category of public information under section 552.022 is "final opinions, including concurring and

dissenting opinions, and orders issued in the adjudication of cases.” Gov’t Code § 552.022(a)(12). One of the documents submitted by the General Counsel in Attachment E is a final opinion that he partially underlined. The General Counsel claims that the underlined opinion is excepted from disclosure pursuant to sections 552.103, 552.107, and 552.111 of the Government Code. However, sections 552.103, 552.107, and 552.111 are discretionary exceptions under the Public Information Act and, as such, do not make information confidential.¹ Accordingly, the General Counsel may not withhold the underlined opinion in Attachment E from disclosure under sections 552.103, 552.107, or 552.111 of the Government Code.

However, the General Counsel also claims that the underlined opinion is excepted from disclosure under the Texas Rules of Evidence. Although this office does not generally address the applicability of discovery and evidentiary rules to submitted information, the Texas Supreme Court recently held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we address whether Rule 503 of the Texas Rules of Evidence excepts the underlined opinion from disclosure. Rule 503 provides in pertinent part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (a) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (b) between the lawyer and the lawyer’s representative;
- (c) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (d) between representatives of the client or between the client and a representative of the client; or

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body’s position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute “other law” that makes information confidential.

- (e) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See* Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ); *see also* Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure). Based on the General Counsel’s statements and our review of the opinion, we find that the underlined portions of the opinion constitute confidential communications transmitted between privileged parties. Therefore, the final opinion in Attachment E is excepted from disclosure in its entirety pursuant to Rule 503 of the Texas Rules of Evidence.

The General Counsel also claims that all of the information he submitted is excepted from disclosure pursuant to section 552.103. Section 552.103 provides in pertinent part:

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

Gov't Code, § 552.103(a),(c). The commission maintains 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. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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 section 552.103(a). Further, the litigation must be pending or reasonably anticipated on the date that the information is requested. *See* Gov't Code § 552.103(c). Finally, contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation under section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

A governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture" when establishing that litigation is reasonably anticipated. *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be "realistically contemplated"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). The General Counsel states that the requestor's law firm has filed a motion for reconsideration asking the commission to reconsider untimely hearing requests filed by the firm's clients. The General Counsel also informs us that the filing of a motion for reconsideration is a prerequisite to an appeal pursuant to sections 55.27(g) and 80.272(b) of Title 30 of the Texas Administrative Code. Pursuant to section 552.303 of the Government Code, our office requested that the commission submit additional briefing detailing the procedural steps that a person must follow in seeking a commission hearing for the type of application at issue in this instance. In that supplemental briefing, you state that once that motion is denied either by the commission or by operation of law, the commissioner's decision is final and appealable under section 5.351 of the Texas Water Code.

After careful review of the commission's original and supplemental arguments, as well as the information submitted by the General Counsel, we find that litigation is reasonably

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

anticipated in this matter and that most of the information is related to the litigation for purposes of section 552.103. Accordingly, we conclude that the General Counsel may withhold from disclosure the information which we have marked in Attachments C and E, as well as the entirety of Attachment D, pursuant to section 552.103 of the Government Code. However, since the General Counsel states that the filings in Attachment E have already been made available to the requestor, we conclude that unadulterated copies of the filings are not excepted from disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982) (finding that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information).³ Accordingly, the General Counsel must release the portions of the filings in Attachment E that have already been made available to the requestor.

The Executive Director claims that some of the information he submitted to us is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107 protects information encompassed by the attorney-client privilege. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from 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. *See* Open Records Decision No. 574 at 5 (1990). Purely factual communications from attorney to client, or between attorneys representing the client, are not protected. *See id.* at 3. After careful review of the information submitted by the Executive Director, we agree that some of it constitutes either a client confidence or an attorney's legal advice or opinion. Accordingly, we conclude that the information that the Executive Director seeks to withhold under section 552.107 of the Government Code may be withheld from disclosure under that exception.

The Executive Director also claims that some of the information he submitted to us is excepted from disclosure pursuant to section 552.111 of the Government Code as intra-agency communications. 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. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also 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.). The

³ Further, we note that the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

purpose of section 552.111 is “to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). An agency's policymaking functions 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. *See* Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *See* *Arlington Indep. Sch. Dist.* at * 6-7; ORD 615 at 4-5. Finally, 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. *See* Open Records Decision No. 559 at 2 (1990). The Executive Director states that the matter which is the subject of this request involves the Executive Director's development of several areas of policy for the commission relating to granting amended water rights on reservoirs and that these documents were all developed in an effort to perform that function. After reviewing the information submitted by the Executive Director, we conclude that some of it concerns policymaking processes. Therefore, the information that the Executive Director seeks to withhold under section 552.111 of the Government Code may be withheld from disclosure under that exception.

In summary, the General Counsel may withhold the final opinion in Attachment E from disclosure in its entirety pursuant to Rule 503 of the Texas Rules of Evidence. The General Counsel may withhold from disclosure the information which we have marked in Attachments C and E, as well as the entirety of Attachment D, pursuant to section 552.103 of the Government Code. However, we conclude that unadulterated copies of the filings in Attachment E are not excepted from disclosure under section 552.103. We conclude that the information that the Executive Director seeks to withhold under section 552.107 of the Government Code may be withheld from disclosure under that exception. We conclude that the information that the Executive Director seeks to withhold under section 552.111 of the Government Code may be withheld from disclosure under that exception.

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).

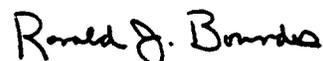
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 150355

Enc. Marked documents

cc: Mr. Bill Aleshire
Hill, Gilstrap, Riggs, Adan & Graham, L.L.P.
1005 Congress Avenue
Austin, Texas 78701
(w/o enclosures)