



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 24, 1994

Mr. Gary L. Wood
Senior Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR94-661

Dear Mr. Wood:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 28449.

The City of Houston ("the city") was notified in 1987 that it was a potentially responsible party for a designated Hazardous Substance Superfund site, and as such potentially liable for cleanup and other costs associated with the site. The Texas Natural Resource Conservation Commission ("TNRCC") recently notified the city that it would make a final decision as to the city's responsible party status once the cleanup order is issued. The TNRCC indicated that another potentially responsible party signed an agreed order to conduct a remedial investigation/feasibility study, and that by signing this agreed order the city could avoid paying TNRCC oversight costs. If the city is named a responsible party, it would be liable for TNRCC oversight costs as well as cleanup and other associated costs. You have informed this office that the TNRCC is continuing its investigation as to the city's liability for cleanup of the site and has asked the city for documents to further that investigation. No final order has been issued.

The city also received an open records request for photographs of the site and information about the site. The city has already released some information about the site to the requestor. You contend, however, that some of the records responsive to this request are excepted from disclosure under sections 552.103(a) and 552.107(1) of the Government Code. You have submitted to this office for review the records that you seek to withhold. These records are labeled Exhibit Nos. 5 through 8.¹ We will address your arguments.

¹We note that you also submitted to this office documents labeled Exhibit Nos. 1 through 4. It appears that Exhibit Nos. 3 and 4 are responsive to the request. Since you have made no argument against releasing these documents, we assume they have been disclosed to the requestor.

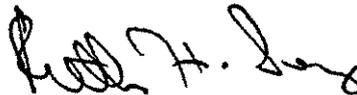
You contend that Exhibit No. 5, a memorandum prepared by a city attorney, is excepted from disclosure under section 552.107(1). Section 552.107(1) protects information that reveals client confidences or the attorney's legal advice, opinion, or recommendation. See Open Records Decision No. 574 (1990). We have reviewed the memorandum and determined that it may be withheld from disclosure under section 552.107(1).

You also contend that Exhibit Nos. 6 through 8 are excepted from disclosure under section 552.103(a). To show the applicability of section 552.103(a), a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *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 (1990) at 4. The city has provided documents showing that litigation is reasonably anticipated. A review of Exhibit Nos. 6 through 8 shows that this information is related to the litigation. Because the city has met its burden of showing the applicability of section 552.103(a), this information may be withheld from disclosure.

In reaching this conclusion, we assume that the opposing party to the litigation has not previously had access to the records at issue. Absent special circumstances, once information has been obtained by all parties to the litigation, e.g., through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 (1982) at 2. If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). The applicability of section 552.103(a) also ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3. We note that since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is within the city's discretion to release this information to the requestor. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/KHG/rho

Ref.: ID# 28449

Enclosures: Submitted documents

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(w/o enclosures)