



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 21, 1995

Ms. Raenell Silcox
Attorney
Resource Protection Division
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744

OR95-411

Dear Ms. Silcox:

You ask 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# 31213.

The Texas Parks and Wildlife Department (the "department") received a request for information relating to a discharge of oil from a Koch Gathering Systems, Inc. ("Koch") pipeline into Gum Hollow Creek, Nueces Bay, and Corpus Christi Bay. You ask whether the department may withhold the requested information from required public disclosure based on sections 552.101, 552.103 and 552.111 of the Government Code. You say you expect the requestor to periodically request additional information about the oil spill in the future. You ask whether the department needs to request an open records decision from this office each time it receives a request for information about the oil spill.

We begin by observing that pursuant to section 40.107(c)(4), (5) of the Natural Resources Code, the department has adopted rules that affect the public's right to review certain information pertaining to the cleanup of pollution from oil spills. *See* 31 T.A.C. § 69.73. Generally, these rules require the state trustees to provide the public with an opportunity to review certain information and comment at certain stages in the process of assessing natural resource damage resulting from an oil spill. *See id.* §§ 20.22(1) (requiring trustees to provide opportunity for public review and comment on assessment plans, restoration plans, and settlement agreements), .36(e)(1) (requiring trustees to submit a restoration project for public review and comment), .42(b) (requiring public review and comment of final settlement agreement between trustees and responsible person), .44(b) (prohibiting trustees from executing any document which relieves

responsible person from liability for natural resource damages until public has had opportunity to review and comment on document), .44(c) (requiring trustees to provide opportunity for public review and comment when trustees select assessment procedures and protocols for negotiated, expedited or comprehensive assessment, when restoration plan is proposed, and prior to certification of completion of restoration plan), .44(d) (requiring trustees to invite members of public to participate in development and design of equivalent resource plan, and allowing member of public to request a hearing on said plan), .44(e) (permitting trustees to invite public to participate in determining whether assessment is necessary). The requestor asserts that public participation in the natural resource damage assessment process must be at a meaningful stage.

We believe that these rules control access to particular information pertaining to the oil spill. The rules require, and in some cases permit, public review of certain information, including an equivalent resource plan, an assessment plan, a restoration plan, settlement agreements, restoration projects, and any document that relieves the responsible party from liability. The department may not invoke a discretionary exception in the Open Records Act as authority to withhold such information from required public disclosure.

As for the information for which the department's rules do not provide a right of public access, we will consider the exceptions you raise. Section 552.103(a) applies to information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991).

The Governor of Texas designated the department as one of the trustees for the state's natural resources pursuant to the Oil Spill Prevention and Response Act, chapter 40 of the Natural Resources Code.¹ As a trustee, the department may bring a court action to recover natural resource damages sustained as the result of an unauthorized discharge

¹The state trustees for natural resources also include the Texas Natural Resource Conservation Commission, and the Texas General Land Office.

of oil. See Nat. Res. Code § 40.107; 31 T.A.C. § 20.41. You inform us that the trustees are currently involved in settlement negotiations with Koch concerning the spill at Gum Hollow Creek, Nueces Bay, and Corpus Christi Bay. You assert that “[i]f we cannot protect documents provided to us voluntarily by Koch, [the public release of those documents] may result in the loss of Koch’s cooperation and the consequent loss of an opportunity to settle our claim.”

We believe that the requested information relates to settlement negotiations and/or reasonably anticipated litigation to which the department is or may be a party. We, therefore, conclude that the department may withhold the requested information based on section 552.103 of the Government Code, with the exceptions noted below.

As mentioned above, the department may not withhold from disclosure information that is public by department rule. In addition, we do not agree that the protection of section 552.103 extends to any documents Koch has seen or had access to. When the opposing parties in anticipated litigation have seen or had access to requested information, there is no justification for withholding that information from the public pursuant to section 552.103(a). Open Records Decision Nos. 597 (1991), 349 (1982). Therefore, the department may not withhold based on section 552.103 any of the information that Koch has had access to. This information includes a video tape you say Koch made during and after the spill; the report entitled “Natural Resource Damage Assessment: Gum Hollow Creek Release,” prepared for Koch by its contractor, Entrix, Inc.; the “MOU” document prepared by Entrix, Inc.; the letter dated March 9, 1995, from Mr. Don Pitts, NRDA Coordinator, to Mr. Allan Hallack, Assistant General Counsel for Koch Industries; the document titled “Trustee Comments on Draft Entrix report on Koch Gum Hollow/Nueces Bay Oil Spill”; and the agenda and sign-in sheet for the March 30, 1995 meeting concerning the oil spill.

You may withhold the handwritten comments on the “MOU” document based on section 552.103 of the Government Code. The copy of the Entrix report that you enclosed contains handwritten comments of department staff. The department may withhold these comments from required public disclosure pursuant to section 552.103. The cover letter to the report indicates that Entrix sent the department five copies of this report. The department may release another copy that contains no comments. The report indicates that it includes appendices that were not enclosed with the copy you sent to this office. All of the information in the appendices is likewise subject to disclosure. We note that the applicability of section 552.103(a) ends once the settlement agreement is reached or the litigation is concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

As we have determined that section 552.103 does not apply to the information that the opposing party has had access to, we must determine whether that information is excepted from disclosure by the other exceptions you raise, sections 552.107 and 552.111 of the Government Code. We conclude that these exceptions do not apply to the information at issue.

Section 552.107(1), which incorporates the attorney-client privilege of the rules of evidence, does not except information the opposing party has produced or had access to. *See* Open Records Decision No. 630 (1994) at 4. Nor does section 552.111 apply. Section 552.111 of the Government Code excepts from required public disclosure:

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

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). Generally, section 552.111 does not apply to information submitted to a governmental body by an outside party. *But see* Open Records Decision No. 631 (1995) (applying § 552.111 to information created for governmental body by outside consultant when consultant is acting at request of governmental body and performing task within authority of governmental body). In addition, section 552.111 is waived by the release of the information to the public. *See* Open Records Decision No. 435 (1986). Thus, the department may not withhold any of the information from required public disclosure based on section 552.111 of the Government Code.

You ask us to consider whether section 552.101 of the Government Code in conjunction with copyright law applies to Attachment VIII. This attachment consists of a document that lists slides taken by a student who you say is studying the Gum Hollow Creek area. Section 552.101 excepts from required public disclosure information that is confidential by law. You say the slides depict the area before and after the spill. The document contains the following statement, which you say may constitute an effective copyright:

The slides were provided by the photographer at cost of duplication and usage or further duplication of such shall be limited to the above stated purpose by the mentioned agencies, unless otherwise approved by the photographer.

It is not within the purview of this office to determine whether this statement is an effective copyright. When requested records are copyrighted, they may be open for public inspection if not subject to an exception to disclosure, but a governmental body is not required to furnish the requestor with copies of such records, and the requestor assumes the duty of complying with the federal copyright law. *See* Open Records Decision No. 550 (1990). We believe that the slides relate to the pending settlement negotiations and are therefore excepted from required public disclosure based on section 552.103 of the Government Code.

Finally, you ask whether the Open Records Act requires the department to request an open records decision from this office each time it receives a request for information concerning the Nueces Bay spill. You inform us the resolution of the department's

claims, whether litigated or settled, will likely take several years and generate hundreds, perhaps thousand, of documents. You point out that the Open Records Act does not require a governmental body to treat a request as a continuing one. See Attorney General Opinion JM-48 (1983).

A governmental body need not request an attorney general decision if there has been a previous determination that the requested material falls within one of the exceptions to disclosure. See Gov't Code § 552.301(a). This means that the department need not request a decision if the request is for the precise information that this office has already ruled on. Since you anticipate requests for information that the department will generate in the future, the future requests cannot involve the same actual information that is the subject of this request. Consequently, the department may not rely on this decision as a previous determination for purposes of future requests for information concerning the Gum Hollow Creek, Nueces Bay, and Corpus Christi Bay oil spill.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Government Section

KHG/rho

Ref: ID# 31213

Enclosures: Submitted documents

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