



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 22, 1995

Mr. Gregory J. Pfeifer
Staff Attorney
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR95-803

Dear Mr. Pfeifer:

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# 33179.

The Texas Natural Resource Conservation Commission (the "commission") received a request for the number of natural resource damage claims pending and the total amount of damages being sought for each claim.¹ You have informed us that, although not legally required to do so, the commission will gather the number of pending lawsuits in which the commission is seeking to recover for natural resource damage and the total dollars sought in those lawsuits. The requestor has stated that she intends her request to be read as seeking the broadest category of documents. Thus, you assume the requestor seeks the files that pertain to the pending claims. Therefore, you claim that the remainder of the requested information is excepted from disclosure under sections 552.103(a), 552.107, and 552.111 of the Government Code. You submitted representative samples of the documents requested for our review.²

¹We note that the requestor sought two other categories of documents for which the commission raises no exception to disclosure. Therefore, we do not consider the public availability of those two requested categories of documents in this ruling.

²In reaching our conclusion here, we 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) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information,

Section 552.103(a) of the Government Code 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.

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. *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 commission must meet both prongs of this test for information to be excepted under 552.103(a).

The Governor of Texas has designated the commission as one of the trustees for the state's natural resources pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.*, and the Clean Water Act, 33 U.S.C. § 1321(c). See 40 C.F.R. § 300.605³ As a trustee, the commission may bring a court action to recover natural resource damages sustained as the result of an unauthorized discharge of hazardous material. See Nat. Res. Code § 40.107. You state that as a trustee, the commission has the responsibility to generate files to enable the commission to recover natural resource damage claims. You further state that the purpose for generating these files is to gather data to substantiate a natural resource damage claim in litigation. You state that claims are "pending" because litigation is anticipated. We conclude that the requested information relates to settlement negotiations and/or reasonably anticipated litigation to which the commission is or may be a party. Therefore, with the exceptions noted below, the commission may withhold the requested documents under section 552.103(a).

(Footnote continued)

all must be submitted). 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.

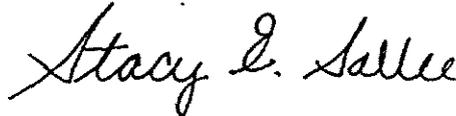
³The state trustees for natural resources also include the Texas Parks and Wildlife Department and the Texas General Land Office.

The commission may not withhold documents that the opposing parties have previously seen or had access to. When the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

As we have held that the commission may not withhold the documents previously disclosed to the responsible parties, we must address your other claimed exceptions. We conclude that neither section 552.107 nor section 552.111 excepts the documents previously disclosed to the opposing parties from disclosure. Open Records Decision Nos. 574 (1990) (section 552.107 does not apply to communications that are not confidential), 435 (1986) (section 552.111 waived by release of information to public). Therefore, the commission may not withhold documents previously disclosed to the opposing parties.

We are resolving this matter with an 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 should 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,



Stacy E. Sallee
Assistant Attorney General
Open Government Section

SES/KHG/rho

Ref.: ID# 33179

Enclosures: Submitted documents

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(w/o enclosures)