



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 18, 1997

Mr. Kevin McCalla
Director, Litigation Support Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR97-2089

Dear Mr. McCalla:

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# 108670.

The Texas Natural Resource Conservation Commission (the "commission") received a request for "any and all documents sent to, received by, and/or sent by the TNRCC and officials or other employees from or to any representative of Envirocare of Texas, Inc. or Envirocare of Utah, Inc. ("Envirocare"), including but not limited to Capital consultants, Billy Clayton, and/or Nancy Molleda . . . from 1995 to date." The requestor also seeks all documents relating to the proposals by Envirocare or Waste Control Specialists (WCS) to engage in low-level radioactive waste storage, treatment or disposal activities in Andrews County, Texas. You inform us the commission has released most of the requested information to the requestor, but seeks to withhold the remainder of the requested information pursuant to sections 552.107, 552.110 and 552.111 of the Government Code. We have considered your arguments and have reviewed the information submitted.

Section 552.107(1) of the Government Code protects information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct." *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *Id.* Upon review of the documents submitted, we conclude that a portion of the information may be withheld under section 552.107(1). However, some of the information appears to consist of notes which do not contain client confidences or an attorney's legal advice or opinion. Such information is not protected under section 552.107(1). *See id.* at 7 (section 552.107 protects legal advice and opinion but not purely factual information merely because it is reported by an attorney). For your convenience, we

have marked the information in Exhibit B and in the exhibit marked "Additional Materials" that may be withheld under section 552.107(1).

You also claim that certain documents in Exhibit B and in the exhibit marked "Additional Materials" may be withheld as attorney work product under section 552.107. This office recently stated that if a governmental body wishes to withhold attorney work product, the proper exception to raise is either section 552.103 or section 552.111. Open Records Decision No. 647 (1996). We announced in Open Records Decision No. 647 (1996) that a governmental body must show that the work product (1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and (2) consists of or tends to reveal the thought processes of an attorney. *Id.* at 5. The commission has not made either of these demonstrations. Accordingly, the commission may not withhold the requested information from disclosure as attorney work product.

You seek to withhold the materials in Exhibit C and some of those marked "Additional Materials" under section 552.111. Section 552.111 excepts "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. An agency's policymaking functions, however, do not encompass routine internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5.

This office has also found that where a document is a genuine preliminary draft that has been released or is intended for release in final form, the draft necessarily represents the advice, opinion, and recommendation of the draftee; release would reveal something of the deliberative process by indicating where additions and deletions were made. Therefore, the draft itself, including comments, underlining, deletions, and proofreading marks are excepted by section 552.111, but not purely factual matters that are severable. When such factual matter is contained in the released final product, however, there is no need to release it from the draft. Open Records Decision No. 559 (1990). Upon review of the information you have marked as excepted under section 552.111, we conclude that a portion of such information relates to the policy functions of the commission and is therefore excepted under section 552.111. We have marked this information for your convenience. A portion of the information is purely factual, however, and must therefore be released.

Finally, you assert that the information contained in Exhibit D constitutes the trade secrets of WCS and is therefore excepted from disclosure under section 552.110. We also note that certain submitted information may implicate the proprietary rights of Envirocare. Therefore, pursuant to section 552.305 of the Government Code, we notified WCS and Envirocare of the request for

information and of their opportunity to claim that the information at issue is excepted from disclosure. WCS responded to our notice by indicating they have no objection to release of the requested information. Envirocare did not respond to our notice. This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6. As neither WCS or Envirocare has submitted arguments for withholding the requested information under section 552.110, we conclude the commission may not rely on this section to withhold the requested information.

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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 108670

Enclosures: Marked documents

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