



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 29, 1998

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

OR98-0288

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# 112025.

The Texas Natural Resource Conservation Commission (the "commission") received a request for information regarding URI Kingsville Dome Mine ("URI"). Although you have released the public information, you claim that the remaining documents are excepted from disclosure under sections 552.103, 552.107, 552.108 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the representative sample of documents.<sup>1</sup>

Initially, you assert that some of the documents, which you have marked, are excepted from disclosure by section 552.103. Section 552.103(a) excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. 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.--

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<sup>1</sup>In 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). 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.

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 section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

You state that URI has a production area authorization ("PAA") application pending before the commission. You also inform us that the commission has received approximately six requests for hearing and you anticipate that there will be a contested case proceeding on the PAA application. After reviewing your arguments, we conclude that you have demonstrated that litigation is reasonably anticipated. Furthermore, we conclude that the documents for which the commission has asserted section 552.103(a) relate to the anticipated litigation, and may be withheld. We note that 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). In addition, 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).

You also contend that a portion of one document is excepted from disclosure under section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public 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. Open Records Decision No. 574 (1990), at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* After reviewing the submitted document, we agree that the information you have marked reveals either confidential communications from the client to the attorney or the attorney's legal advice or opinions. Consequently, the marked portion may be withheld from disclosure.

Next you claim that certain documents are excepted from disclosure 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 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. After reviewing the marked documents, we conclude that they may be withheld under this exception.

Finally, you claim that section 552.108 protects several documents within the submitted material. Section 552.108 of the Government Code provides in part:

(b) An internal record or notation of a law enforcement agency or prosecution that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

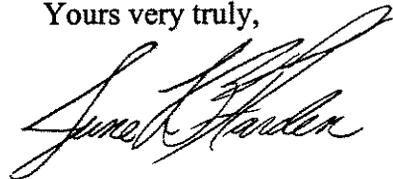
(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication.

You inform us that these documents were produced and maintained by the Special Investigations ("SI") unit. This unit has the sole responsibility of conducting and participating in the criminal detection, investigation and prosecution of environmental crimes. You also explain that the records at issue are examples of internal record-keeping documents maintained by SI on all cases investigated, whether or not there was ever an indictment, information or other public charge made. Additionally, you state that in the present case there was no indictment, conviction or deferred adjudication resulting from the investigation, and the case is now considered closed. Finally, you state that release of the closed files would interfere with law enforcement and should therefore be excluded from disclosure. After reviewing the submitted documents, we find that the information at issue may be withheld from public disclosure under section 552.108(b)(2). We note that "basic information about an arrested person, an arrest, or a crime" is not excepted from required public disclosure. Gov't Code § 552.108(c). Basic information is the type of information that is considered to be front page offense report information, including a detailed description of the offense and arrest, even if this information is not actually located on the front page of the offense

report. *See generally Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 187 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Therefore we conclude that, except for basic information, the commission may withhold the marked information from disclosure under section 552.108(a).

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/alg

Ref.: ID#112025

Enclosures: Submitted documents

cc: Mr. Jep Hill  
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(w/o enclosures)