



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 4, 1998

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

OR98-1119

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# 114512.

The Texas Natural Resource Conservation Commission (the "commission") received a request for any documents relating to the natural resources at the Koppers Co., Inc. Texarkana Plant National Priorities List Site (Texarkana NPL Site) which includes any document relating to the natural resources at the Texarkana NPL Site or relating to evaluation of natural resource damages alleged to be associated with the Texarkana NPL Site. You ask whether the commission may withhold the requested information from required public disclosure based on sections 552.103, 552.107, and 552.111 of the Government Code. The commission submitted representative samples of the requested information.¹ We have considered the exceptions you claimed and have reviewed the documents at issue.

We note that the documents in question arise from the commission's performance of a natural resource damage assessment of an oil spill as a "trustee," pursuant to the Oil Spill

¹In reaching our conclusion here, we assume that the "representative samples" submitted to this office are 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, 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.

Prevention and Response Act, chapter 40 of the Natural Resources Code. *See* Nat. Res. Code § 40.107. The Governor of Texas designated the commission as one of the trustees for the state's natural resources pursuant to the Oil Spill Prevention and Response Act.² As a trustee, the commission may bring a court action to recover natural resource damages sustained as the result of an unauthorized discharge of oil. *See* Nat. Res. Code § 40.107; 31 T.A.C. § 20.41.

As provided by section 40.107(c)(4)-(5), the commission has adopted rules governing the assessment process. *See generally* 31 T.A.C. §§ 20.1-.44. Some of these rules 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.³ Therefore, we find that the commission may not invoke a discretionary exception in the Open Records Act as authority to withhold such information from required public disclosure.⁴

However, as for the information relating to the assessment process that is not specifically made available to the public under commission rules, we will consider the exceptions you raise. Section 552.103(a) excepts from disclosure information relating to litigation or settlement negotiations to which the state is or may be a party. A governmental body 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 Nos. 638 (1996) at 2, 551 (1990) at 4. A governmental body must meet both prongs of this test for information to be excepted under 552.103(a). Open Records Decision No. 638 (1996) at 2.

²The state trustees for natural resources also include the Texas Parks and Wildlife Department and the Texas General Land Office.

³For example, 31 T.A.C. §§ 20.22(a)(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).

⁴The 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. We believe that these rules control access to particular information pertaining to the oil spill.

In light of the statutory scheme involved in natural resource damage assessments and the unique nature of these assessments, which can result only in settlement or litigation of natural resource damage claims, and having examined the information submitted to us for review, we conclude that you have demonstrated the applicability of section 552.103 to the requested information. We also note that the applicability of section 552.103(a) for anticipated or pending litigation ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision.⁵ 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,



Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/alg

Ref: ID# 114512

Enclosures: Submitted documents

cc: Ms. Michele M. Gutman
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(w/o enclosures)

⁵As we resolve your request under section 552.103(a), we need not address your claimed exceptions under sections 552.107 and 552.111 at this time.