



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 27, 1998

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

OR98-2506

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 119089.

The Texas Natural Resource Conservation Commission (the "TNRCC") received a request for "copies of any and all documents related to the development of Chapter 321 rules proposed and adopted during 1994-1996." *See* Title 30, Texas Administrative Code, chapter 321. You furnish a copy of a TNRCC letter to the requestor confirming an agreement by telephone to narrow the scope of the request to materials pertaining only to certain subchapters of chapter 321. You indicate that some of the information responsive to the request is available to the requestor, but seek to withhold other responsive records, of which you submit representative samples,¹ under sections 552.107 and 552.111 of the Government Code.

¹We note that you submitted as "Exhibit E" representative materials which you say "are interpreted by TNRCC to be outside the scope of the request as agreed to by the requestor on August 6, 1998." We do not address such Exhibit E materials here. If you determine from consultation with the requestor that these materials were included in the information the requestor is seeking, you must resubmit these materials for our determination should you seek to withhold them.

Also, please note that in reaching our conclusion, 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 No. 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.

Section 552.111 excepts from required disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Section 552.111 excepts interagency and intraagency memoranda and letters to the extent that they contain advice, opinion, or recommendation intended for use in the entity’s policymaking process. Open Records Decision No. 615 (1993) at 5. The purpose of this section is “to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref’d n.r.e.) (emphasis added). Drafts of documents that have been released or intended for release in final form may be withheld under 552.111. Open Records Decision No. 559 (1990). On the other hand, section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982).

We have considered your arguments under section 552.111 and reviewed the documents at issue. The material you have submitted consists mostly of commission drafts of the chapter 321 rules, and memoranda, letters, and notations written by and directed to commission staff containing advice, opinion, and recommendations about the proposed rules. Some of the communications regarding proposed or draft rules are made from other state agencies. Also, some factual material is included in these communications, but we find that it is inextricably intertwined with protected advice, opinion, and recommendations.

We note, however, that some of the information you submitted, included in your exhibit “D3,” consists of comments on proposed rules and other input regarding the commission’s formulation of the rules in question from private associations and companies. These materials are not inter- or intraagency communications; you have not explained why they may be withheld under section 552.111. *See* Open Records Decision No. 429 (1985). You have raised no other exception to their disclosure, and thus they must be released.² You may, however, redact under section 552.111, the notations on those materials made by commission staff.

Assuming that you have released or will release materials which have already been made available to the public, we conclude that, except as noted above, you may withhold the information you submitted under section 552.111. Having resolved your request under section 552.111, we need not address your section 552.107 claim.³

²We note that these communications do not appear to contain proprietary material which would implicate third part rights under section 552.305.

³We have determined that the small portion of the information you submitted for which you also claimed section 552.107 protection may be withheld in its entirety under section 552.111.