



March 12, 1999

Ms. Margaret Hoffman  
Director, Environmental Law Division  
Texas Natural Resource  
Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR99-0702

Dear Ms. Hoffman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 121992.

The Texas Natural Resource Conservation Commission (the "commission") received a request for information pertaining to the commission's Underground Injection Control ("UIC") Program. You have released most of the requested information; however, you claim that information submitted as Exhibits C-1 and C-2 is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *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 at 4 (1990). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the commission must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>1</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). The fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983).

After reviewing your arguments, we conclude that your assertion that litigation may be anticipated is merely speculative at this time. Because you have not shown that litigation is reasonably anticipated, you may not withhold the requested information under section 552.103.

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.

Generally, 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. Yet, where a document is a genuine preliminary draft that has been released or is intended for release in final form, factual information in that draft which also appears in a released or releasable final version is excepted from disclosure by section 552.111. Open Records Decision No. 559 (1990). However, severable factual information appearing in the draft but not in the final version is not excepted by section 552.111. *Id.*

First, you seek to withhold the handwritten notes in Exhibit C-1. After reviewing the information, we conclude that the information does not reflect the commission's policymaking process. Thus, you may not withhold the handwritten notes in Exhibit C-1 under section 552.111.

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<sup>1</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Exhibit C-2 is an interagency draft document from the Environmental Protection Agency (the "EPA") to the commission. When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

Exhibit C-2 is the EPA's draft of its Notice of Deficiency regarding the EPA's approval of the commission's UIC Program Revision application. After reviewing the submitted records, we conclude that the commission and the EPA do not share a privity of interest or common deliberative process with regard to the policy matter at issue. Therefore, you may not withhold the records under section 552.111.

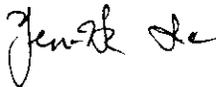
In addition, you rely on Open Records Decision No. 561 (1990) to withhold Exhibit C-2 from public disclosure. In Open Records Decision No. 561, this office held that where a federal agency shares information with a governmental body in Texas pursuant to a policy affording the governmental body greater access to the information than that afforded to the general public, the statutory predecessor to section 552.101 will except such information from public disclosure if the *information is confidential in the hands of the federal agency under federal law*. ORD 561 at 8. You explain that in sending Exhibit C-2 to the commission, an EPA representative requested the commission to limit access to the records. While the EPA may wish to withhold the information, you have not established that it is confidential in the hands of the EPA under federal law. Accordingly, the proposition in Open Records Decision No. 561 on which you rely is not applicable here.

You further argue that Exhibit C-2 is excepted from public disclosure pursuant to *General Electric Co. v. United States Environmental Protection Agency*, 18 F. Supp.2d 138 (D. Mass. 1998). In *General Electric Co.*, the EPA sought to withhold its own documents that had been disclosed to several state agencies under the "inter-agency or intra-agency memoranda" exception of the federal Freedom of Information Act. Here, the commission seeks to withhold records it received from a federal agency. We note that the court did not "express an opinion concerning the status of these federal documents if located and demanded from the state agency files." *General Elec. Co.*, 18 F. Supp.2d at 142 n. 3. The court concluded that "[l]etters or documents that merely inform state agencies of the status of federal regulatory efforts or announce federal policy do not fall within the exemption." *Id.* at 142. Rather, the court held that documents which the EPA has shared with state agencies for consultative purposes in coordinating joint regulatory efforts are exempt from disclosure as part of the federal agency's deliberative process. *Id.* The facts in *General Electric Co.* are not analogous to the instant case. Here, the shared communication was not for consultation purposes as it was in *General Electric Co.* We conclude that *General Electric Co.* is not

applicable to the instant case. Thus, you may not withhold Exhibit C-2 under section 552.111. You must release the submitted 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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Sincerely,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/nc

Ref.: ID# 121992

Enclosures: Submitted documents

cc: Mr. Richard Lowerre  
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(w/o enclosures)