



May 13, 1999

Mr. Paul Sarahan, Director
Litigation Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR99-1319

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 124176.

The Texas Natural Resource Conservation Commission (the “commission”) received a request for information “concerning the property located at 309-11 W. 5th Street in Austin, Texas (commonly referred to as the ‘Former American Cleaners’ site).” You have made some of the requested information available to the requestor. You contend that the remaining information is excepted from disclosure pursuant to sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exception you claim and have reviewed a representative sample of the documents at issue.¹

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

¹We 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.

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). The governmental body must meet both prongs of this test for information to be excepted under 552.103(a). You have not met either prong of this test. Therefore, the commission may not withhold any of the information at issue pursuant to section 552.103.

Section 552.107(1) excepts from disclosure 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. *Id.* 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.* We note also that a governmental body may waive the attorney-client privilege by voluntarily disclosing privileged material to outside parties. Open Records Decision No. 630 at 4 (1994). We have reviewed the documents for which you claim section 552.107 and marked the portions of those documents that are excepted from disclosure under section 552.107.

You claim that portions of the submitted documents are excepted from disclosure under section 552.111. Section 552.111 excepts from disclosure "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. Section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. ORD 615 at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in a final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 (1990). The draft itself, including comments, underlining, deletions, and proofreading marks, is excepted from disclosure by section 552.111. *Id.* Purely factual matter, where severable, must generally be released. *Id.* However, when such factual matter is contained in the final version of the document, the release of the final version satisfies this requirement. *Id.* We have marked a draft document that you may withhold in its entirety under section 552.111 if the document has been or will be released in its final form. We have also marked

some opinions on policymaking issues that are excepted from disclosure under section 552.111.

Finally, you contend that some of the documents at issue are protected attorney work product. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *Id.* at 3-4. The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. *Id.* at 4. You have not met both prongs of the work product test for any of the information at issue. Therefore, with the exception of the information we have marked as protected under sections 552.107 and 552.111, the commission must release the information at issue to the requestor.

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.

Sincerely,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref.: ID# 124176

encl. Marked documents

cc: Mr. Patrick Finn
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P.O. Box 201179
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(w/o enclosures)