



April 15, 2002

Ms. Stephanie Bergeron
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OR2002-1872

Dear Madam/Sir:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161242.

The Texas Natural Resource Conservation Commission (the "commission") received a request for copies of "all records relating to correspondence regarding proposed rulemaking for cement kilns and incineration of hazardous waste in cement kilns." The commission also received two additional requests for: 1) records pertaining to "proposed rulemaking relative to cement kilns and the disposal of hazardous waste by incineration in cement kilns" and the "air compliance case against Holnam Texas, LP"; and 2) "Ellis County industrial sources," "Dallas-Fort Worth State Implementation Plan and the decision to exclude Ellis County from the four-county nonattainment (NA) area," and "Ellis County's designation as 'unclassifiable'." The General Counsel states that it will make available to the requestors all of the documents that it believes constitute public information. The Environmental Law Division and the General Counsel each submitted a separate set of documents that it wishes to withhold from disclosure. You claim that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.111 of the Government

Code. We have considered the exceptions you claim and have reviewed the submitted information.

We note at the outset that the commission failed to comply with the procedural requirements of section 552.301 of the Government Code. Section 552.301 provides in pertinent part that a governmental body that requests an attorney general decision must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general a copy of the written request for information. *See Gov't Code § 552.301(e)(1)(B)*. However, as of the date of this letter, the commission has failed to provide us with copies of the written requests for: 1) copies of information pertaining to the "proposed rulemaking relative to cement kilns and the disposal of hazardous waste by incineration in cement kilns" and the "air compliance case against Holnam Texas, LP"; and 2) "Ellis County industrial sources," "Dallas-Fort Worth State Implementation Plan and the decision to exclude Ellis County from the four-county nonattainment (NA) area," and "Ellis County's designation as 'unclassifiable'."

When a governmental body fails to submit a copy of a written request to us within the fifteen business day time period, the requested information at issue is presumed public. *See Gov't Code § 552.302; see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must demonstrate a compelling interest in order to overcome the presumption that the requested information is public. *See id.* Normally, a compelling interest exists when some other source of law makes the requested information confidential or when third party interests are at stake. *See Open Records Decision No. 150 at 2 (1977)*. We note that sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions to disclosure under the Public Information Act (the "Act") that do not constitute compelling interests sufficient to overcome the presumption that the requested information is public.¹ However, since the General Counsel also claims that the information at issue is excepted from disclosure under section 552.101 of the Government Code, we address that claim with respect to the information requested in the latter two requests received by the General Counsel.

The General Counsel claims that the Texas Rules of Civil Procedure and Evidence excepts this specifically requested information from disclosure. We note that we generally do not address discovery and evidentiary rules that may or may not be applicable to information submitted to our office by a governmental body. *See Open Records Decision No. 416 (1984)*

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

(finding that even if evidentiary rule specified that certain information may not be publicly released during trial, it would have no effect on disclosability under Act). The General Counsel argues that the Texas Rules of Civil Procedure and Evidence constitute “other law” that makes this responsive information confidential. However, we note that “[t]he Texas Rules of Civil Procedure and the Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W. 3d 328 (Tex. 2001). The information submitted to us for review by the General Counsel does not fall into one of the categories of information made expressly public by section 552.022. Therefore, the Texas Rules of Civil Procedure and the Texas Rules of Evidence are not applicable to this information. Accordingly, the General Counsel may not withhold any portion of the information it submitted to us for review pursuant to the Texas Rules of Civil Procedure and Evidence. Consequently, the General Counsel must release this information to the requestor.

The Environmental Law Division claims that the information it submitted to us for review is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code, § 552.103(a), (c). The commission maintains 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 on the date that the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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 commission must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that this information relates to a lawsuit filed against the commission which is styled as *Cemex USA and Texas Industries, Inc. v. Texas Natural Resource Conservation*

Commission et al., Cause No. GN 001480 and which is pending in the 201st Judicial District Court of Travis County. Based on our review of your representation and this information, we conclude that the commission has demonstrated that litigation was pending on the date that it received the request and that this information is related to that litigation for purposes of section 552.103. Accordingly, we conclude that the commission may withhold most of this information from disclosure pursuant to section 552.103 of the Government Code.²

However, we note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis. Some of this information, which we have marked, has been seen by the opposing parties in this matter. Although you argue that section 552.103 excepts from disclosure documents relating to settlement negotiations involving a state agency, even if those documents have been exchanged between the parties to the settlement negotiations, we note that section 552.103 no longer expressly includes within its scope information relating to settlement negotiations as it did before its amendment in 1999. See Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 6, sec. 552.103(a), 1999 Tex. Gen. Laws 4500, 4502. Accordingly, the marked information that has been seen by the opposing parties in this matter may not be withheld from disclosure by the Environmental Law Division under section 552.103 of the Government Code.

However, you also claim that this marked information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code. Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. See Gov't Code § 552.101. This exception to disclosure encompasses information protected by other statutes. Section 154.073 provides in pertinent part:

(a) Except as provided by Subsections (c), (d), (e), and (f) a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of

² We note that the applicability of section 552.103(a) ends once the litigation has been concluded. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).

confidential information or data relating to or arising out of the matter in dispute.

Civ. Prac. & Rem. Code § 154.073(a), (b). Although you state that the commission has entered into settlement discussions with the opposing parties in the aforementioned lawsuit, you do not indicate that these discussions are taking place through alternative dispute resolution procedures. Thus, we have no basis to conclude that section 154.073 is applicable to any portion of this information. Accordingly, the Environmental Law Division may not withhold any information from disclosure under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practices and Remedies Code.

You also claim that one of the documents that is not excepted from disclosure under section 552.103, or portions thereof, is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information encompassed by the attorney-client privilege. We note that in instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. 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 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. *See* Open Records Decision No. 574 at 5 (1990). Based on our review of your arguments and this document, we conclude that the information contained in that document was communicated by a third party, does not contain a commission attorney's legal advice or opinion or a client confidence, and was not otherwise demonstrated to us to constitute a privileged communication. Therefore, the Environmental Law Division may not withhold any portion of this document from disclosure pursuant to section 552.107 of the Government Code.

You also claim that this document, or a portion thereof, is excepted from disclosure as attorney work product under section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure under section 552.111 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. *See* Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were 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 or release 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. *See id.* at 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. Based on our review of your arguments and this document, we conclude that you have not sufficiently demonstrated that any portion of the document constitutes attorney work product. Accordingly, the Environmental Law Division may not withhold any portion of this document from disclosure as attorney work product pursuant to section 552.111 of the Government Code.

You also claim that some of the documents that are not excepted from disclosure under section 552.103 are excepted from disclosure pursuant to the deliberative process privilege in section 552.111 of the Government Code. Section 552.111 also 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. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W. 3d 152 (Tex. App.--Austin, 2001, no pet.). The purpose of section 552.111 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). We find that these documents constitute communications between the commission and third parties with whom the commission shares no privity of interest. *See* Open Records Decision Nos. 561 at 9 (1990) (finding that where no privity of interest or common deliberative process exists information may not be withheld from disclosure under section 552.111). Accordingly, the Environmental Law Division may not withhold any portion of these documents from disclosure pursuant to the deliberative process privilege under section 552.111 of the Government Code.

However, we note that some of the information that is not excepted from disclosure under section 552.103 contains e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in pertinent part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Accordingly, unless the members of the public in question have affirmatively consented to their release, the Environmental Law Division must withhold from disclosure the e-mail addresses that we have marked in this information pursuant to section 552.137 of the Government Code.

In summary, the commission must release to the requestor all responsive information held by the General Counsel. The commission may withhold from disclosure most of the information maintained by the Environmental Law Division pursuant to section 552.103 of the Government Code. The commission must withhold from disclosure the e-mail addresses that we have marked in the remaining information pursuant to section 552.137 of the Government Code, unless the members of the public in question have affirmatively consented to their release. The commission must release the remaining information, which we have marked, to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

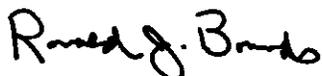
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 161242

Enc. Marked documents

cc: Ms. Becky Bornhorst
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(w/o enclosures)