



October 29, 2002

Mr. Paul C. Sarahan  
Director, Litigation Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-13087

OR2002-6143

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# 171442.

The Texas Commission on Environmental Quality (the "commission") received a request for information regarding the Choke Canyon Water System. You state that some information has been released to the requestor. You claim, however, that the remainder of the requested information is excepted from disclosure under sections 552.103, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.108(a) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law

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<sup>1</sup> 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 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.

enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. Open Records Decision No. 474 at 4-5 (1987).

You state that the records you have submitted as enclosure 2 are records of the commission's Special Investigation Unit relating to a criminal investigation and pending criminal prosecution. You state that the records contain investigative information directly related to a federal criminal investigation in which the Special Investigation Unit is assisting. You have submitted a copy of the indictments in cause numbers 99-5057 and 99-5058 in the 331st Judicial District Court in Travis County that resulted from this investigation. You state that release of the information in enclosure 2 would interfere with the prosecution of these cases. Based on your representations and our review of the submitted information, we determine that the release of the information in enclosure 2 would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); *see also* Open Records Decision No. 586 (1991) (need of another governmental body to withhold information provides compelling reason for nondisclosure under section 552.108). Accordingly, we determine that the commission may withhold the Special Investigation Unit information in enclosure 2 pursuant to section 552.108 of the Government Code.

You next claim that certain responsive information maintained by the civil side of the commission is also excepted from required public disclosure. You contend that the documents in enclosure 10 are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 of the Government Code provides as follows:

(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. .

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 was pending or reasonably anticipated on the date the governmental body received the request for information, 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, 481 (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). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

You state that there is currently an enforcement action pending against Choke Canyon Water System which may only be resolved through settlement, administrative hearing, or trial. See Open Records Decision No. 588 (1991) (contested cases conducted under Administrative Procedure Act, Gov't Code ch. 2001, are litigation for purposes of section 552.103). You state that the information you wish to withhold is relevant to the pending enforcement action and includes internal commission documents, such as enforcement referral documents, inspection reports, violation summaries, and penalty calculations, among other things. You claim that disclosure of this information could jeopardize the commission's resolution of the enforcement action against Choke Canyon Water System. You also specifically argue that the notes and strategy documents drafted by commission attorneys in anticipation of settlement or litigation should be withheld under section 552.103(a). Based on our review of the submitted documents, we agree that they relate to the pending enforcement action. Therefore, the commission may withhold the documents in enclosure 10 under section 552.103(a) of the Government Code.

We note, however, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You contend that the information in enclosure 11 is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to the attorney's client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) 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. Enclosure 11 consists of e-mails

between commission staff, commission attorneys, and counsel from the Office of the Attorney General. You represent that these e-mails are confidential communications seeking legal advice and opinion. Upon review, we agree that the submitted documents reveal the client's confidential communications. Therefore, we determine the commission may withhold the documents in enclosure 11 pursuant to section 552.107(1) of the Government Code.

Next, you contend that the information in enclosures 12 and 13 is excepted from disclosure under section 552.111 of the Government Code. You argue that the document submitted as enclosure 12 is 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. Open Records Decision No. 647 at 4 (1996). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *National Tank v. Brotherton*, 851 S.W.2d 193, 204 (Tex. 1993). Upon review, we find that enclosure 12 was created in the course of a pending administrative enforcement action and reveals an attorney's mental processes and legal theories. Accordingly, we determine the commission may withhold enclosure 12 under 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. An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Upon review, we agree that the documents in enclosure 13 are internal communications reflecting the policymaking processes of the commission. Thus, we determine the commission may withhold enclosure 13 under section 552.111 of the Government Code.

In summary, the commission may withhold enclosure 2 under section 552.108(a)(1) of the Government Code. Enclosure 10 may be withheld under section 552.103 of the Government

Code. Enclosure 11 is protected by attorney-client privilege and may be withheld under section 552.107 of the Government Code. Enclosure 12 may be withheld as work product under section 552.111 of the Government Code, and enclosure 13 may be withheld as interagency memoranda under section 552.111 of the Government Code.

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,

A handwritten signature in black ink, appearing to read 'DRS', with a long horizontal flourish extending to the right.

David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 171442

Enc: Submitted documents

c: Mr. Christopher M. Gunter  
Law Office of Christopher M. Gunter  
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Austin, Texas 78701  
(w/o enclosures)