



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 24, 2004

Mr. Paul Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

OR2004-8171

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 209824.

The Texas Commission on Environmental Quality (the "commission") received a request for information related to "30 TAC § 111.155." You state that some responsive information has been provided to the requestor. You claim that some of the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. You claim that portions of the requested information may contain proprietary information subject to exception under the Act. Pursuant to section 552.305(d) of the Government Code, the commission notified the interested third parties, Nucor Corporation ("Nucor") and Temple-Inland Forest Products ("Temple-Inland"), of the commission's receipt of the request and of each company's right to submit arguments to us as to why any portion of the submitted information pertaining to it should not be released. *See Gov't Code §552.305(d); see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have considered the claimed exceptions and reviewed the submitted information, some of which consists of representative samples.¹

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.

Initially, we note that the information you have submitted as Attachment D appears to consist of information relating to emissions. Under the federal Clean Air Act, emission data must be made available to the public, even if the data otherwise qualify as trade secret information. *See* 42 U.S.C. § 7414(c). As a general rule, the exceptions to disclosure found in the Act do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Thus, to the extent that this particular information contains information that constitutes emission data for purposes of section 7414(c) of title 42 of the United States Code, the commission must release that information to the requestor in accordance with the federal law.

Next, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Nucor has not submitted to this office its reasons explaining why the requested information relating to it should not be released; therefore, this office has no basis for concluding that Nucor has a proprietary interest in this information. Accordingly, we conclude that you may not withhold any portion of the submitted information relating to Nucor on the basis of its proprietary interest in the information. As you raise no other exceptions to the release of this information, it must be released to the requestor.

We next address the commission's claim that Enclosure 10 of Attachment C is excepted from public disclosure under section 552.103 of the Government Code, which 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.

Gov't Code § 552.103(a), (c). The commission 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 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, 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). The commission must meet both prongs of this test for information to be excepted under 552.103(a). Contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. See Open Records Decision No. 588 at 7 (1991).

You state that the commission's Enforcement Division referred enforcement actions, alleging violations against Nucor and the Texas Lime Company, to the commission's Litigation Division to initiate litigation through contested case hearings at the State Office of Administrative Hearings. You advise that the information submitted as Tab 10 was created by commission staff "following investigations [and after] deciding that enforcement actions were necessary to address the violations discovered during the investigations." Based on your representations and our review of this information, we conclude that the commission has demonstrated that litigation was pending on the date it received the request for information. Furthermore, we find that the information in Tab 10 is related to the pending litigation for purposes of section 552.103.

However, we note that if the opposing party in the litigation has seen or had access to any of this information, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982).² Otherwise, you may withhold Tab 10 of Attachment C from the requestor under section 552.103.

We now turn to your claim under section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives,

² In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

lawyers, and lawyer representatives. Tex. R. Evid. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us that the information at issue under section 552.107(1) reveals communications between attorneys for the commission and the attorneys’ clients. You also assert that these communications were not intended to be disclosed to persons other than those to whom communications were made in furtherance of the rendition of professional legal services to the system. Based on your representations and our own review of the information that you seek to withhold under section 552.107(1), we conclude that this exception is applicable to some of the information at issue. You have not demonstrated, however, and it is not otherwise clear to this office, that section 552.107(1) is applicable to other information for which you claim this exception. We have marked the information that the commission may withhold under section 552.107(1).

You assert that some of the remaining information is excepted from release under section 552.111 of the Government Code. Section 552.111 excepts from required public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental

body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See Open Records Decision No. 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982). The preliminary draft of a policymaking document that has been released or is intended for release in 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 at 2 (1990).

You state that portions of the remaining submitted information relates to staff advice, opinions, and recommendations on policymaking matters. Based on your arguments and our review of the information at issue, we conclude that you may withhold some of that information under section 552.111. We have marked that information accordingly.

Section 552.111 also encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

A governmental body that seeks to withhold information under section 552.111 and the attorney work product privilege bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. See TEX. R. CIV. P. 192.5; Open Records Decision No. 677 at 6-8. In order

for this office to conclude that information was created or developed in anticipation of litigation, we must be satisfied that

(a) 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 (b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). 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." *Id.* at 204; Open Records Decision No. 677 at 7.

You state that the documents the commission seeks to withhold as attorney work product are related to enforcement actions. You further state that members of the commission's Enforcement Division and commission attorneys created the notes and drafts at issue, and that these documents exhibit the Enforcement staff members' and attorneys' thought processes about the litigation proceedings. After considering your arguments, this office concludes that the marked attorney work product is excepted from disclosure under section 552.111 of the Government Code.

Finally, we address Temple-Inland's argument that information pertaining to that company, which you have submitted in Exhibit D, is excepted from disclosure under section 552.101 of the Government Code which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." We note that section 552.107(2) of the Government Code is the more appropriate exception in this instance. Section 552.107(2) excepts from required public disclosure information if "a court by order has prohibited disclosure of the information." Temple-Inland advises that the commission is prohibited from releasing the information at issue pursuant to a court order. The commission has provided this office with a copy of the Agreed Judgment in Cause No. 24-346-90-7, *State of Texas v. Temple-Inland Forest Products Corp.* As a part of the agreed judgment, Temple-Inland was required to obtain an engineering study, with the results of the study and related findings and recommendations to be submitted to the commission's predecessor agency. Part IV of the Agreed Judgment provides that the study "shall be maintained as confidential by [the commission.]" In addition, Part I of the Agreed Judgment provides that all "correspondence . . . interim reports, final reports, and findings by the consultant(s) shall be submitted simultaneously to the [commission], subject to the confidentiality provisions of Section IV of this Agreed Judgment." On this basis, we conclude that the commission must withhold the Temple-Inland materials under section 552.107(2) as information made confidential by court order, to the extent that these particular documents do not contain information that constitutes emission data which must be released in accordance with the federal law. *See English v. General Elec. Co.*, 496

U.S. 72, 79 (1990); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (federal law preempts state law only to extent that state law actually conflicts with federal law).

In summary, to the extent that the submitted information constitutes emission data for purposes of section 7414(c) of title 42 of the United States Code, the commission must release that information to the requestor in accordance with federal law. We have marked the information that the commission may withhold under sections 552.103, 552.107, and 552.111 of the Government Code. The commission must withhold the Temple-Inland materials under section 552.107(2) as information made confidential by court order, to the extent that these particular documents do not contain information that constitutes emission data which must be released in accordance with the federal law. The remaining submitted information must be released 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 Dep't of Pub. 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,



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Assistant Attorney General
Open Records Division

CN/krl

Ref: ID# 209824

Enc. Submitted documents

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