



## Office of the Attorney General

State of Texas

December 3, 1996

DAN MORALES  
ATTORNEY GENERAL

Mr. John A. Riley, Director  
Litigation Support Division  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR96-2281

Dear Mr. Riley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 37587.

The Texas Natural Resource Conservation Commission ("TNRCC") received a request for information relating to the investigation of E.P.A. Transportation Services, Inc. ("EPA"). You have identified the documents that are responsive to the request and submitted copies of those documents, labeled Attachments 1 through 3, to this office for review. You contend that Attachment 1 is excepted from disclosure pursuant to sections 552.101, 552.103, 552.111, and 552.107 of the Government Code and that Attachments 2 and 3 are excepted from disclosure pursuant to section 552.101 of the Government Code.

Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103, a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). You have shown that Attachment 1, an inspection report and related documents, is related to a pending enforcement action that TNRCC filed against EPA. Thus, you may withhold Attachment 1 from disclosure under section 552.103.

We note that if EPA has seen or had access to any of the information in Attachment 1, there would be no justification for now withholding that information from the public pursuant

to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Of course, TNRCC has discretion to release all or part of the information in Attachment 1 that is not otherwise confidential by law. See Gov't Code § 552.007.<sup>1</sup>

You state that "Attachments 2 and 3 contain information that discloses or tends to disclose the identity of a confidential informant." Consequently, you contend that Attachments 2 and 3 are excepted from disclosure under section 552.101 of the Government Code. The informer's privilege, incorporated into the Open Records Act by section 552.101,<sup>2</sup> protects the identity of one who reports a violation or possible violation of the law to officials having the duty of enforcing that law. See *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The privilege protects the content of the informant's communication only to the extent that it identifies the informant. *Roviaro*, 353 U.S. at 60. However, once the identity of the informer is known to the subject of the communication, the privilege is no longer applicable. Open Records Decision No. 202 (1978) at 2.

An informant contacted a TNRCC official and reported that EPA was in violation of certain environmental regulations that TNRCC is charged with enforcing. The informant's communications are documented in Attachments 2 and 3. We have marked the information contained in Attachments 2 and 3 that identifies or tends to identify the informant. Assuming that representatives of EPA do not know the identity of the informant, this information falls within the scope of the informer's privilege and is excepted from disclosure pursuant to section 552.101. The remainder of the information contained in Attachments 2 and 3 is not excepted from disclosure and thus must be released 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 any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

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<sup>1</sup>Because we conclude that TNRCC may withhold Attachment 1 from disclosure under section 552.103, we need not address your claims that sections 552.101, 552.107, and 552.111 of the Government Code also except Attachment 1 from disclosure.

<sup>2</sup>Section 552.101 excepts information from disclosure "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

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Enclosures: Submitted documents

cc: Mr. Louis LaMonte  
Chairman/CEO  
E.P.A. Transportation Services, Inc.  
P.O. Box 3095  
Beaumont, Texas 77704  
(w/o enclosures)