



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 13, 1998

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

OR98-1215

Dear Mr. Riley:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 114807.

The Texas Natural Resource Conservation Commission (the "commission") received a request for "any and all records in the possession of [TNRCC] . . . generated, received, obtained, or distributed by the TNRCC during the period January 1, 1990 to the present in relation to the Mahard facilities in Prosper, Texas, and the surrounding area, including, without limitation, the Springhill Facility." In response to the request, you submitted to this office for review a representative sample of the information which you assert is responsive. You indicate that the commission is making available to the requestor portions of the requested information. However, you have submitted certain information and ask whether it is confidential under sections 552.101 and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and have reviewed the submitted documents.<sup>2</sup>

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<sup>1</sup>You state that "the specific information requested [has been] labeled to indicate which exceptions apply to which parts of the copy," however, your submissions lacked any markings. Accordingly, we have marked the information that may be withheld.

<sup>2</sup>In your initial letter to this office, the commission also cites to section 552.107 of the Government Code. However, you only explained how sections 552.101 and 552.111 applied to the submitted information. The Government Code places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). Therefore, in this ruling, we only consider the applicable exceptions for which you have offered support.

Section 552.111 excepts "an interagency or intra-agency 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, however, 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 (1993) at 5-6.

Generally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. Yet, where a document is a genuine preliminary draft that has been released or is intended for release in final form, factual information in that draft which also appears in a released or releasable final version is excepted from disclosure by section 552.111. Open Records Decision No. 559 (1990). However, severable factual information appearing in the draft but not in the final version is not excepted by section 552.111. *Id.*

In this instance, the submitted representative documents consist of several letters from the Texas Air Control Board<sup>3</sup> apparently responding to complaints regarding Mahard Egg Farms. The letters do not appear to be "interagency or intra-agency memorandum," nor communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the commission; but, rather the letters are communications to the public concerning their complaints. After reviewing the submitted documents we conclude that the information is not excepted by section 552.111.

You also assert that the complainants' identifying information is excepted from public disclosure by the informer's privilege under section 552.101. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The Texas courts have recognized the informer's privilege. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 (1988) at 3, 208 (1978) at 1-2. The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 (1981) at 2 (citing

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<sup>3</sup>The Texas Air Control Board is the predecessor agency of the commission.

Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 (1990) at 2, 515 (1988) at 4-5. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 (1990) at 5. We conclude that you may withhold the complainants' identifying information, which we have marked, under section 552.101 in conjunction with the informer's privilege.

We are resolving this matter with an informal letter ruling rather than with a published open records decision.<sup>4</sup> This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A large, stylized handwritten signature in black ink that reads "Sam Haddad". The signature is written over the typed name "Sam Haddad".

Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/rho

Ref: ID# 114807

Enclosures: Marked documents

cc: Ms. Jill A. Kotvis  
Chair, Environmental Practice Group  
Hughes & Luce, L.L.P.  
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(w/o enclosures)

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<sup>4</sup>In reaching our conclusion, 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)(where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). 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.