



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

June 2, 2003

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

OR2003-3705

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# 182003.

The Texas Commission on Environmental Quality (the "commission") received a written request for all information pertaining to complaints filed with the commission regarding the requestor's hog farm. You state that some of the responsive information has been released to the requestor. You contend, however, that the remaining information coming within the scope of the request, a representative sample of which you submitted to this office, is excepted from required disclosure pursuant to sections 552.101, 552.103, 552.107(1), and 552.111 of the Government Code.<sup>1</sup>

You first contend that the contents of Attachment C are excepted from required public disclosure pursuant to section 552.101 of the Government Code in conjunction with the informer's privilege. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

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<sup>1</sup>In reaching our conclusion here, 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 No. 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.

The informer's privilege has been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of *violations of law to officers charged with enforcement of that law*. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, *by preserving their anonymity*, encourages them to perform that obligation. [Emphasis added.]

The "informer's privilege" aspect of section 552.101 protects the identity of persons who report violations of the law. When information does not describe conduct that violates the law, the informer's privilege does not apply. Open Records Decision Nos. 515 (1988), 191 (1978). Although the privilege ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 285 (1981), 279 (1981); *see also* Open Records Decision No. 208 (1978). This may include enforcement of quasi-criminal civil laws. Open Records Decision Nos. 515 (1988); 391 (1983). The privilege, however, protects the contents of communications only to the extent they reveal the identity of the informant. *Roviaro v. United States*, 353 U.S. at 60. Because part of the purpose of the privilege is to prevent retaliation against informants, the privilege does not apply when the informant's identity is known to the individual who is the subject of the complaint. *See* Open Records Decision No. 208 (1978).

After reviewing your arguments and the submitted information, we conclude that you have established the applicability of the informer's privilege to portions of the documents you submitted as Attachment C, and we have marked those documents accordingly. Assuming the requestor is not aware of the identities of the informants, the commission may withhold the information we have marked pursuant to the informer's privilege. However, because you have not raised any other exception for the remaining information in Attachment C, the remainder of those documents must be released to the requestor.

You next seek to withhold the contents of Attachment D pursuant to section 552.107(1) 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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).

Based on your representations and our review of the submitted documents, we conclude that you have met your burden of establishing that the contents of Attachment D constitute privileged attorney-client communications for purposes of section 552.107(1). Accordingly, the commission may withhold these document in their entirety pursuant to section 552.107(1).

Finally, you contend that the contents of Attachment E are excepted from required public disclosure pursuant to section 552.103 of the Government Code. Section 552.103 is often referred to as the “litigation” exception. To show that section 552.103(a) is applicable, the commission must demonstrate that (1) litigation was pending or reasonably anticipated on the date the commission received the records request 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). To demonstrate that litigation is reasonably anticipated, the commission must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

Based on your representations and our review of the submitted documents, we conclude that you have established that the contents of Attachment E relate to reasonably anticipated litigation to which the commission will be a party and that the litigation was reasonably anticipated on the date the commission received the records request. *See* Open Records

Decision No. 588 (1991) (contested case under Administrative Procedure Act, Government Code chapter 2001, constitutes "litigation"). The commission therefore may withhold Attachment E in its entirety pursuant to section 552.103 of the Government Code.<sup>2</sup>

In reaching this conclusion, we assume that the opposing party to the litigation has not previously had access to the records at issue; once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Consequently, if the opposing party in the litigation has seen or had access to these records, there would be no justification for now withholding those records from the requestor pursuant to section 552.103. We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the commission may withhold the information in Attachment C that we have marked as coming within the informer's privilege, but the remaining portions of those documents must be released to the requestor. The commission may also withhold all of Attachment D pursuant to section 552.107(1), and all of Attachment E pursuant to section 552.103.

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

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<sup>2</sup>Because we resolve your request under section 552.103, we need not address your arguments regarding the applicability of section 552.111 of the Government Code.

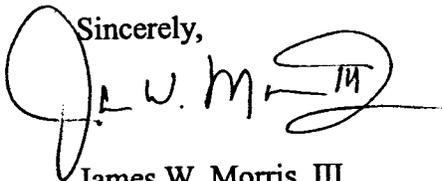
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is stylized with a large initial "J" and a flourish at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/RWP/seg

Ref: ID# 182003

Enc: Submitted documents

c: Mr. Gary Wallace  
Wallace Hog Farms  
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(w/o enclosures)