



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 28, 2005

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

OR2005-11622

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# 238943.

The Texas Commission on Environmental Quality (the "commission") received a request for information related to a "natural gas treating facility" located in Robertson County. You state that some responsive information has been released to the requestor. You claim that some of the requested information is excepted from disclosure under section 552.101 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted representative sample of information.²

¹We note that the coversheet of Attachment C states "Section 552.111, Agency Memoranda"; however, you did not discuss this section in your communications to this office or otherwise indicate that the commission desires to withhold the information at issue under this section; thus, we understand that the commission intended to assert only section 552.101. *See generally* Gov't Code §§ 552.301(e)(1)(A) (governmental body must submit general written comments stating reasons why stated exceptions apply that would allow the information to be withheld), 552.302 (failure to comply with section 552.301 results in legal presumption that requested information is public).

²We 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.

We begin by noting that some of the submitted documents are not responsive to the instant request for information, as they were created after the date that the commission received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the department need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

We next note that a portion of the information you have submitted to us for review is the identical information that was the subject of a previous ruling from this office. *See* Open Records Letter No. 2005-10532 (2005). We understand you to represent that the circumstances existing at the time of the issuance of this ruling have not changed and that, consequently, the four criteria for a “previous determination” established by this office in Open Records Decision No. 673 (2001) have been met in this situation. Therefore, we conclude that the commission must continue to rely on Open Records Letter No. 2005-10532 (2005) in regard to the portion of the submitted information that was the subject of the previous ruling.

Next, we address your arguments for the remaining responsive information. Section 552.101 exempts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses information protected by the informer’s privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer’s privilege 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 at 3 (1988), 208 at 1-2 (1978). 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 at 2 (1981); 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 at 2 (1990), 515 at 4-5 (1988).

You inform us that the submitted information pertains to the investigation of complaints of the release of noxious fumes. You state that the complainants alleged possible violations of section 382.085(a) of the Health and Safety Code and section 101.4 of title 30 of the Texas Administrative Code. You indicate that the commission is authorized to enforce these provisions. We also understand that the alleged violations could result in the imposition of administrative or civil penalties. However, having examined these provisions, your

arguments, and the documents at issue, we conclude that none of the remaining information consists of identifying information of complainants, and the commission may not withhold this information under section 552.101 on that ground. Instead, the commission must release the remaining information 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 238943

Enc. Submitted documents

c: Mr. Andrew M. Taylor
Bracewell & Giuliani, L.L.P.
Suite 2300
111 Congress Avenue
Austin, Texas 78701
(w/o enclosures)