



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 30, 2008

Mr. Jeffrey J. Huhn
Acting Director, Litigation Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2008-08766

Dear Mr. Huhn:

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# 314461.

The Texas Commission on Environmental Quality (the "commission") received a request for information related to commission reviews of the Hays County Environmental Health Department (the "department"), and documents related to a named individual and a specified company. You state that you have released some of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. The common-law informer's privilege, which is incorporated into the Act under section 552.101, has long been recognized by Texas courts. *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 (1998), 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) *citing* 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). However, the informer's privilege protects the content of the communication only to the extent that it identifies the informant. *Roviaro v. United States*, 353 U.S. 53, 60 (1957).

You explain that pursuant to chapter 366 of the Texas Health and Safety Code, the commission has designated the department as an authorized agent for purposes of administering chapter 366 and the commission rules adopted thereunder. You state that the department has a duty of inspection or of law enforcement relating to on-site sewage disposal systems. You explain that the commission oversees the department's administration of these on-site sewer disposal programs by conducting periodic administrative reviews pursuant to section 366.034 of the Health and Safety Code. *See* Health & Safety Code § 366.034. You state that in the course of conducting an administrative review of the department, the commission obtained the submitted complaint form. You state that the complainant referenced in the submitted complaint form alleged a violation of chapter 285 of title 30 of the Texas Administrative Code. You further indicate that the commission is responsible for enforcing this environmental law under Texas Water Code sections 7.052 and 7.102. You state that pursuant to section 7.052 of the Water Code, the commission may assess an administrative penalty against a person who violates the law and that pursuant to section 7.102 of the Water Code, the commission may impose a civil penalty for a violation of this law. *See* Water Code §§ 7.052, 7.102. Based on your representations and our review of the submitted complaint form, we conclude that the commission may withhold the complainant's identifying information, which you have marked, under section 552.101 of the Government Code in conjunction with the informer's privilege. The remaining information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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. 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,



Jordan Hale
Assistant Attorney General
Open Records Division

JH/mcf

Ref: ID# 314461

Enc. Submitted documents

c: Mr. Charles O'Dell, Ph.D.
President
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(w/o enclosures)