



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 29, 2010

Ms. Kathleen C. Decker
Director
Litigation Division
Texas Commission on Environmental Law
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711

OR2010-04388

Dear Ms. Decker:

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# 374032 (PIR No. 10.01.04.13).

The Texas Commission on Environmental Quality (the "commission") received a request for the following three categories of information: (1) information pertaining to ten specified complaints filed against Aruba Petroleum, Inc. ("Aruba"); (2) a list of individuals who had access to, viewed, or communicated information pertaining to those ten complaints; and (3) any records reflecting that information otherwise responsive to category (1) or category (2), above, has been destroyed. You state the commission has made some responsive information available to the requestor. You claim the marked portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.137 of the Government Code.¹ We have

¹Although you cited section 552.103 of the Government Code and the work product aspect of section 552.111 of the Government Code in your initial brief to this office, you make no arguments explaining the applicability of the litigation exception or the work product privilege to the submitted information. Therefore, we assume you have withdrawn these arguments.

considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note the commission did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to “ask for the attorney general’s decision and state the exceptions that apply within a reasonable time but not later than the tenth business-day after the date of receiving the written request.” Gov’t Code § 552.301(b). While the commission raised sections 552.101, 552.111, and 552.137 within the ten-business-day time period as required by subsection 552.301(b), the commission did not raise section 552.107 until after the ten-business-day deadline had passed. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Section 552.107 is a discretionary exception to disclosure which protects a governmental body’s interests and may be waived. *See* Open Records Decision No. 676 at 11-12 (2002) (attorney-client privilege under section 552.107 and Texas Rule of Evidence 503 subject to waiver). In failing to timely raise section 552.107, we find the commission waived its claim under this exception, and none of the submitted information may be withheld on that basis.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information protected by the common-law 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). 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 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) (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. The privilege excepts the informer’s statement only to the extent necessary to protect that informer’s identity. Open Records Decision No. 549 at 5 (1990).

You state the information you highlighted in Attachment C is the identifying information of complainants who reported possible violations of specific statutes in chapter 382 of the

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.

Health and Safety Code and chapter 26 of the Texas Water Code to the commission. You explain the commission has authority to enforce these laws under sections 7.052 and 7.102 of the Texas Water Code. You further state there are administrative and civil penalties for violations of the laws at issue. *See* Water Code §§ 7.052, 7.102. Based on your representations and our review of the submitted information, we conclude the commission may withhold the information you have highlighted, as well as the information we marked, under section 552.101 of the Government Code in conjunction with the informer's privilege.³

You claim the marked portions of the e-mail submitted in Attachment D are excepted under the deliberative process privilege encompassed by section 552.111 of the Government Code. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. Additionally, section 552.111 does not except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See id.* at 4-5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You inform this office the e-mail in Attachment D represents the deliberative process of commission staff and a commission attorney in developing policy towards responding to incidents at Aruba. Upon review, we have marked the portions of the e-mail in Attachment D reflecting advice, opinion, and recommendations of commission employees on a policy matter, which may be withheld under section 552.111 of the Government Code. However, the remaining information you marked is factual in nature, and is severable from the marked advice, opinion, and recommendation. You do not explain how this recitation of facts constitutes the advice, opinion, or recommendation of commission employees. *See* ORD 615 at 4-5. Accordingly, you failed to demonstrate that section 552.111 is applicable to the remaining information, and it may not be withheld on that basis.

In summary, the commission may withhold the information you highlighted and the information we marked in Attachment C under section 552.101 of the Government Code in conjunction with the informer's privilege, as well as the information we marked in

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Attachment D under section 552.111 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Davis", written in a cursive style.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 374032

Enc. Submitted documents

cc: Requestor
(w/o enclosures)