



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 27, 2011

Ms. Kathleen Decker  
Director, Litigation Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2011-07550

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# 419808 (PIR No. 11.03.18.05).

The Texas Commission on Environmental Quality (the "commission") received a request for information pertaining to violations and investigations of the City of Flatonia's waste water treatment plant and The Outhouse Company, as well as information on who submitted the complaints. You state you have released some of the requested information. You claim that portions the submitted information are excepted from disclosure under sections 552.101 and 552.137 of the Government Code. You also state release of this information may implicate the proprietary interests of The Outhouse Company. Thus, pursuant to section 552.305 of the Government Code, you notified The Outhouse Company of the request and of its right to submit arguments to this office as to why the submitted information should not be released. Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

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 section 552.101 within the ten-business-day time period as required by subsection 552.301(b), the commission did not raise section 552.137 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 id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). However, mandatory exceptions to disclosure cannot be waived by a governmental body. *See* Gov’t Code § 552.352; Open Records Decision No. 574 at n.4 (2001) (mandatory exceptions). Because section 552.137 is a mandatory exception, we will consider the commission’s argument under section 552.137, as well as the commission’s timely-raised claim under section 552.101.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from The Outhouse Company. We, thus, have no basis for concluding any portion of the submitted information constitutes proprietary information of The Outhouse Company. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the commission may not withhold any of the submitted information based on the proprietary interests of The Outhouse Company.

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 section encompasses 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); *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) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. 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 the informer’s identity. *See* Open Records Decision No. 549 at 5 (1990). We note that the informer’s privilege does not

apply where the informant's identity is known to the individual who is the subject of the complaint. *See* ORD 208 at 1-2.

You seek to withhold the information you have highlighted under the informer's privilege. You state this information identifies complainants who reported possible violations of chapters 305 and 312 of title 30 of the Texas Administrative Code to the commission. You explain the commission has the authority to enforce these laws under section 26.127 of the Water Code. You explain violations of these laws carry administrative and civil penalties. *See* Water Code §§ 7.052, .102. Upon review, we find the information we have marked identifies the complainants. Therefore, the commission may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.<sup>1</sup> However, you have failed to establish that any of the remaining information you have marked identifies the complainants. Accordingly, the commission may not withhold any of the remaining information on that basis.

We note portions of the remaining information are subject to section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release.<sup>2</sup> Gov't Code § 552.130(a)(1), (2). Thus, the commission must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.<sup>3</sup>

In summary, the commission may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The commission must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code. The remaining information must be released to the requestor.

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.

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>3</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas license plate numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

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](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,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/eb

Ref: ID# 419808

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Scott Mica  
The Outhouse Company  
P. O. Box 322  
Flatonia, Texas 78941  
(w/o enclosures)