



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 15, 2011

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

OR2011-10126

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# 424029 (PIR No. 11.04.25.15).

The Texas Commission on Environmental Quality (the "commission") received a request for all information pertaining to three specified complaint tracking numbers; and all customer satisfaction survey results and information indicating to whom the surveys were sent. You state the commission has released most of the requested information. You claim the marked portions of the three submitted incident data forms are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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. 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); *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 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). 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 assert the marked portions of the incident data forms identify complainants who reported alleged violations of section 101.4 of title 30 of the Texas Administrative Code and Chapter 382 of the Texas Health and Safety Code, also known as the Texas Clean Air Act. You explain the commission has the authority to enforce these laws under Texas Water Code sections 5.103 and 7.102. *See* Water Code §§ 5.103, 7.102. You also state there are civil penalties for a violation of these sections. *See id.* §§ 7.051, .102. Furthermore, there is no indication the entities accused of the alleged violations know the identity of the complainants.

The requestor claims, however, she has submitted multiple requests for records pertaining to complaint tracking numbers 139474 and 141923. Furthermore, we have no indication that in response to those requests, the commission sought a ruling from this office in accordance with section 552.301 of the Government Code. Pursuant to section 552.301, a governmental body that receives a written request for information it wishes to withhold from public disclosure must request a decision from this office no later than ten business days after receiving the request for information. *See* Gov't Code § 552.301(a), (b). If a governmental body fails to request a decision from this office by the tenth business day after receiving the request, the governmental body waives any discretionary claims which may apply to the requested information. *See generally id.* § 552.302; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). We note that because the common-law informer's privilege exists to protect a governmental body's interests, this privilege, unlike other section 552.101 claims, is waived by a governmental body's failure to comply with the procedural requirements of the Act. *See* Open Records Decision No. 549 at 6 (1990) (governmental body may waive informer's privilege). Although you acknowledge the receipt of multiple requests for information pertaining to complaint tracking numbers 139474 and 141923, you represent, and submit certain documentation reflecting, that in the prior requests the requestor specifically excluded any information excepted from disclosure under the Act. Thus, you argue the complainant identifying information in complaint tracking numbers 139474 and 141923 was not responsive to the prior requests. Furthermore, you represent the incident data form for complaint tracking number 153192 has not been previously requested by the requestor. Based on your representations and our review, we find the complainant identifying information was not the subject of previous requests for information. Therefore, the commission has not waived the common-law informer's privilege in this instance. Accordingly, we conclude the complainant identifying information we marked in the incident data forms must be withheld under section 552.101 of the Government Code in

conjunction with the common-law informer's privilege. However, you have failed to demonstrate the remaining information you marked identifies the complainants. Therefore, we find this information is not protected by the common-law informer's privilege. As you raise no other arguments for this information, it 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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/eb

Ref: ID# 424029

Enc. Submitted documents

c: Requestor
(w/o enclosures)