



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 14, 2011

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

OR2011-13282

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# 430540 (PIR No. 11.07.05.17).

The Texas Commission on Environmental Quality (the "commission") received a request for all documents pertaining to Meritage Homes of Texas at Briarwyck. You state the commission has released some of the requested information. You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

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

¹We note that although you did not timely raise section 552.137 of the Government Code, this provision constitutes a compelling reason to withhold information, and we will consider your claim under this section. *See* Gov't Code §§ 552.301, .302.

²We assume 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 those records contain substantially different types of information than that submitted to this office.

(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.

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 section 26.121 of the Water Code to the commission. See Water Code § 26.121. You explain the commission has the authority to enforce this law under section 26.127 of the Water Code. See *id.* § 26.127. You state violations of chapter 26 of the Water Code carry administrative penalties as set forth in section 7.052 of the Water Code, and civil penalties as provided by section 7.102 of the Water Code. See *id.* §§ 7.052, .102. Based on your representations and our review, we conclude the information we have marked identifies complainants who reported possible violations of section 26.121. Thus, the commission may withhold this information under section 552.101 in conjunction with the informer's privilege.

However, we note the informer's privilege is not intended to protect the identities of public officials who have a duty to report violations of the law. Because a public employee acts within the scope of his employment when filing a complaint, the informer's privilege does not protect the public employee's identity. Cf. *United States v. St. Regis Paper Co.*, 328 F.Supp. 660, 665 (W.D. Wis. 1971) (concluding that public officer may not claim informer's reward for service it is his or her official duty to perform). In this instance, some of the identifying information you have highlighted pertains to a public employee who represents the United States Environmental Protection Agency. Because this public employee made the report at issue in the scope of employment, the informer's privilege is not applicable to this information. In addition, some of the remaining information you have highlighted does not identify individuals who reported violations of civil or criminal statutes. Rather, this information pertains to the company that allegedly committed the violations. Accordingly, none of the remaining information at issue may be withheld under section 552.101 in conjunction with the informer's privilege.

You also raise section 552.137 of the Government Code, which states "an e-mail address of a member of the public that is provided for purposes of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. See *id.* § 552.137(c). The remaining information contains an e-mail address of a member of the public that is not specifically excluded by

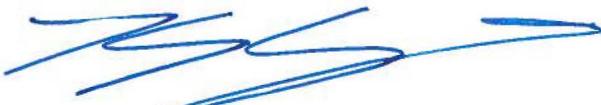
section 552.137(c). Therefore, this e-mail address, which we have marked, must be withheld under section 552.137, unless the owner of the address has affirmatively consented to its release.³ *See id.* § 552.137(b).

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 e-mail address we marked under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release. 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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/eb

Ref: ID# 430540

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We 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 an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.