



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 21, 1997

Mr. Kevin McCalla
Director
Legal Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR97-1172

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 106030.

The Texas Natural Resource Conservation Commission (the "commission") received a request for information regarding a "release of sulfuric acid and/or any other substance" from the Phillips Petroleum plant at Old Ocean, Texas, on or about January 21, 1997. You indicate that the commission is releasing to the requestor portions of the requested information. You assert that the remainder of the requested documents are excepted from required public disclosure based on sections 552.101, 552.103, 552.110, and 552.111 of the Government Code.

You assert that the information regarding Phillips's plant design and its processes are excepted from disclosure by section 552.110 of the Government Code. You also assert protection of these particular records as trade secret information under section 382.041 of the Health and Safety Code.¹ Because the property and privacy rights of third parties may be implicated by the release of the requested information, this office notified Phillips Petroleum Refinery ("Phillips") of its opportunity to claim that the information

¹Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information made confidential by specific statutes, *i.e.*, section 382.041 of the Health and Safety Code.

Phillips submitted to the commission is excepted from required public disclosure. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990). Phillips did not respond to our notice.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. In this instance neither the commission nor Phillips has demonstrated that the requested information constitutes information protected by section 552.110 of the Government Code. Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 (1990) at 5 (party must establish a prima facie case that information is trade secret).

Section 382.041 of the Health and Safety Code protects information submitted to the commission if a prima facie case is established that the information is 1) a trade secret, and 2) if the information was identified as confidential by the submitting party when it was submitted to the commission. Open Records Decision No. 652 (1997). The commission has shown that Phillips identified certain records as confidential at the time it submitted them to the commission. However, neither the commission nor Phillips has demonstrated the information in these records constitutes a trade secret protected from disclosure by section 382.041 of the Health and Safety Code. Open Records Decision No. 652 (1997) at 4 (definition of trade secrets contained in Restatement of Torts and adopted by the Texas Supreme Court for use in common law trade secret actions is appropriate standard in determining if information is "relating to the secret processes or methods of manufacture or production" under section 382.041). Therefore, the commission may not withhold the information under section 552.110 of the Government Code or under section 382.041 of the Health and Safety Code in conjunction with section 552.101 of the Government Code.

We next consider whether the map you have described as showing a geographic distribution of the complainants and certain other marked records, which you submitted to this office for review, are excepted from disclosure under section 552.101 of the Government Code in conjunction with the informer's privilege. The informer's privilege, incorporated into the Open Records Act by section 552.101, 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 the identities of persons who report violations of law to officials who have the duty of enforcing that particular law. *See Roviaro v. United States*, 353 U.S. 53, 59 (1957). The privilege protects those 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 (1981) at 2 (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 (1990) at 2, 515 (1988) at 4-5. The privilege protects the content of the informant's communication only to the extent that it identifies the informant. *Roviaro*, 353 U.S. at 60.

You explain that the map shows the geographic distribution of the complainants and may tend to reveal the informers' identities when read in conjunction with the complaints. You have raised the commission's statutory and regulatory authority to enforce air pollution laws. Having reviewed the submitted records, we conclude that the map and the marked portions of the documents are protected by the informer's privilege and are, therefore, excepted from disclosure pursuant to section 552.101 of the Government Code.

We now consider your assertion that certain documents and certain portions of documents are protected from disclosure by section 552.103(a) of the Government Code.² To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. In this instance you have asserted that the commission is involved in pending enforcement action against Phillips. Based on our review of the documents and on your assertions, we conclude that you have established that litigation is reasonably anticipated and that the information for which you claim the 552.103(a) exception relates to the anticipated litigation. Therefore, you may withhold this information under section 552.103.

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).³

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

²We note that you have already released to the requestor the unmarked portions of the memorandum from Mr. Benton.

³As we conclude that you may withhold this information under section 552.103, we do not address your arguments under section 552.111 of the Government Code.

under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/glg

Ref.: ID# 106030

Enclosures: Marked/submitted documents

cc: Mr. Jack Washburn
Murphrey & Washburn
Attorneys at Law
One Memorial City Plaza
800 Gessner, Suite 890
Houston, Texas 77024
(w/o enclosures)