



September 14, 2001

Mr. Paul Sarahan
Director
Litigation Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR2001-4112

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152233.

The Texas Natural Resource Conservation Commission (the "commission") received a request for all correspondence or other records alleging complaints against a specified company, including correspondence from eight specified individuals to the commission regarding the company and its operations or any alleged violations. The requestor also asks for all investigative reports, findings, and determinations of the commission with regard to the operations. You state that you have made public information available to the requestor. You claim that the identifying information of complainants is excepted from disclosure under section 552.101 of the Government Code in conjunction with the informer's privilege. We have considered your exceptions and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The Texas courts have recognized the informer's privilege. *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

¹In reaching our conclusion here, we 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.

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 (1988). 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 indicate that the complainants reported an alleged violation of title 30, section 101.4 of the Texas Administrative Code and that the commission is charged with enforcing this law. It appears that section 101.4 was adopted pursuant to the Texas Clean Air Act, chapter 382 of the Health and Safety Code. See Health and Safety Code § 382.017(a) (allowing the commission to adopt rules relating to the Clean Air Act). Section 7.177(a)(5) of the Texas Water Code provides that a person commits a criminal offense if that person intentionally or knowingly violates a rule adopted by the commission under chapter 382 of the Health and Safety Code. The violation can carry with it a penalty of between \$1000 and \$100,000, or 180 days confinement. See Water Code §§ 7.177(b)-(c), 7.187(1)(B)-(C), 2(C).

Based on your arguments and our review of the information, we agree that the information that we marked may be withheld under section 552.101 in conjunction with the informer's privilege. However, based on the wording of the request, it is evident that the requestor knows the identity of some of the complainants. See Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). Because the requestor is the attorney for the subject of the complaint and has specifically provided the names of some of the complainants, we conclude that section 552.101 and the informer's privilege does not except the identities of the complainants who were named in the request for information. Further, some of the highlighted names are fire department personnel that responded to a call and are not excepted under the informer's privilege. Therefore, you may withhold the information that we marked, but you must release the remaining submitted information.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/sdk

Ref: ID# 152233

Enc: Submitted documents

c: Mr. Brian W. Bishop
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(w/o enclosures)