



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

March 10, 2003

Mr. Paul Sarahan  
Director, Litigation Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2003-1568

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# 176849.

The Texas Natural Resource Conservation Commission (the "commission") received a request for information regarding "complaints and/or injuries related to any accident/incidents that occurred on November 29, 2001 regarding BASF refinery located at Highway 366, Gate 99, Port Arthur, Texas 77643," including "incident reports or investigations on that date." You state that you have released some of the responsive information to the requestor. You claim that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.101 of the Government Code excepts information considered to be confidential by judicial decision.<sup>2</sup> The informer's privilege, incorporated into the 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). 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

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<sup>1</sup>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.

<sup>2</sup>Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

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 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). In addition, the informer's privilege protects the content of the communication only to the extent that it identifies the informant. *Roviaro*, 353 U.S. at 60.

You explain that the submitted information contains information that would reveal the identity of informers who reported violations or possible violations of section 382.085 of the Texas Health and Safety Code and section 101.5 of title 30 of the Texas Administrative Code, which are environmental laws within the commission's enforcement sphere. You further explain that sections 7.051 and 7.102 of the Texas Water Code provide that violations of sections 382.085 and 101.5 can result in the imposition of administrative and civil penalties. However, upon review of the submitted information, we find that the individuals who reported the alleged violations of law did not report the alleged violations to an official charged with enforcing these specific laws. Rather, the individuals reported the alleged violations to an official unconnected with the commission who then relayed the information regarding the alleged violations to the commission. See Open Records Decision No. 515 (1988); cf. *Texas Dept. of Transp. v. Needham*, 82 S.W.3d 314 (Tex. 2002) (employee not entitled to protection under Whistleblower Act where employee did not make report of violation of law to appropriate law enforcement authority, despite fact that employee believed that agency to whom he reported violation would forward information to law enforcement authority); *City of Houston v. Kallina* 2002 WL 31599973 (Tex. App.—Houston [14 Dist.] 2002) (employee not entitled to protection under Whistleblower Act where employee did not make report of violation of law to appropriate law enforcement authority). Accordingly, we conclude that none of the submitted individual identifying information is protected under the informer's privilege. As you have raised no further exceptions to release, you must release the responsive 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).

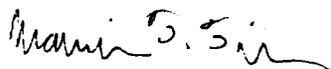
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Maverick F. Fisher  
Assistant Attorney General  
Open Records Division

MFF/sdk

Ref: ID# 176849

Enc: Submitted documents

c: Ms. Amy L. Sanderson  
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(w/o enclosures)