



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 16, 2015

Mr. Robert Martinez  
Director  
Environmental Law Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2015-19388

Dear Mr. Martinez:

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# 579395 (TCEQ PIR Nos. 15-22620, 15-22640).

The Texas Commission on Environmental Quality (the "commission") received two requests from the same requestor for information pertaining to Southwest Water Company, its parent company, and its subsidiaries. The commission states it has released some information.<sup>1</sup> The commission claims some of the submitted information is excepted from disclosure under sections 552.101, 552.111, 552.116, and 552.137 of the Government Code. We have received comments from a representative of the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be

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<sup>1</sup>The commission states the requestor narrowed the scope of the information requested in the second request, and the commission has released the information subject to the more narrowly tailored request. *See* Gov't Code § 552.222 (governmental body may communicate with requestor to clarify or narrow request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

released). We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses the common-law informer’s privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935 (Tex. Crim. App. 1969). The informer’s privilege protects from disclosure the identity of a person who has reported 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. *See Open Records Decision No. 208 at 1-2 (1978)*. The informer’s privilege protects the identity of an individual who has reported violations of statutes to the police or similar law-enforcement agencies, as well as an individual who has reported 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 1-2 (1981)* (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. 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 (1988)*.

The commission states portions of the submitted information identify complainants who reported violations of laws to the commission. The commission informs us, at the time of the complaints, it was charged with the authority and duty to enforce the relevant laws. The commission also states a violation of the relevant laws carries administrative and civil penalties. There is no indication the subjects of the complaints are aware of the identities of the complainants. Based on these representations and our review, we conclude the commission has demonstrated the applicability of the common-law informer’s privilege to the information at issue. Therefore, the commission may withhold the information it has marked, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); *Open Records Decision No. 677 at 4-8 (2002)*. Rule 192.5 defines work product as

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<sup>2</sup>We 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.

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

The commission seeks to withhold the information it has indicated under section 552.111 of the Government Code. The commission explains the information at issue was prepared by commission attorneys who represented the commission's executive director at administrative hearings triggered by rate protests or rate appeals involving Southwest Water Company. Based on these representations and our review, we find the information we have marked consists of work product that the commission may withhold under section 552.111 of the Government Code. However, we find the commission has failed to demonstrate how any of the remaining information at issue consists of materials, mental impressions, or communications prepared in anticipation of litigation or for trial. Therefore, we find the commission has failed to demonstrate the applicability of the work product privilege to the information at issue. Accordingly, the commission may not withhold any portion of the remaining information at issue under the work product privilege of section 552.111 of the Government Code.

Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. The commission informs us Exhibit Q is an audit letter from commission staff to a subsidiary of Southwest Water Company "asking for specific information and identifying certain books, accounts, records, and memoranda that the utility was to make available for review and subsequent analysis by [commission] staff for purposes of reviewing an application for a rate change." The commission explains it had the authority to disallow unsupported costs or expenses based upon the audit. The commission further explains its authority to conduct an audit was set forth in section 13.131(e) of the Water Code. *See* Act of May 27, 1985, 69<sup>th</sup> Leg. R.S., ch. 795, § 3.005, 1985 Tex. Gen. Laws 2719, 2794 (amended 2013) (current version at Tex. Water Code Ann. § 13.131(e) (Vernon Supp. 2014)). Based on these representations and our review, we agree this information consists of audit working papers as defined in section 552.116(b)(2). Accordingly, the commission may withhold Exhibit Q under section 552.116 of the Government Code.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”<sup>3</sup> Gov’t Code § 552.136(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Therefore, the commission must withhold the account numbers in the remaining information under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the commission must withhold the personal e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to public disclosure.

In summary, the commission may withhold the information it has marked, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. The commission may withhold the information we have marked as work product under section 552.111 of the Government Code. The commission may withhold Exhibit Q under section 552.116 of the Government Code. The commission must withhold the account numbers in the remaining information under section 552.136 of the Government Code. The commission must withhold the personal e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to public disclosure. The commission must release the remaining information.

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.

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470(1987).

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Rahat Huq  
Assistant Attorney General  
Open Records Division

RSH/som

Ref: ID# 579395

Enc. Submitted documents

c: Requestor  
(w/o enclosures)