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ATTORNEY GENERAL OF TEXAS

April 22, 2016

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

OR2016-09112

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# 606949 (PIR No. 16-25798).

The Texas Commission on Environmental Quality (the "commission") received a request for all information pertaining to soil and water contamination at a specified address including data, lab analysis, and findings related to two specified investigations. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

The commission asserts the information in Attachment F is excepted from disclosure under section 552.108 of the Government Code. Initially, we consider the commission's assertion its Environmental Crimes Unit (the "ECU") qualifies as a law enforcement agency for purposes of section 552.108. Section 552.108 is applicable only to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

enforce criminal laws. *See* Open Records Decision Nos. 493 at 2 (1988), 287 (1981). Section 552.108 generally does not apply to records created by an agency whose chief function is essentially regulatory in nature. *See* Open Records Decision No. 199 (1978). An agency that does not qualify as a law enforcement agency may claim, under certain limited circumstances, that section 552.108 protects records in its possession. *See, e.g.*, Attorney General Opinion MW-575 (1982), Open Records Decision Nos. 493, 272 (1981).

The commission informs us the ECU is a distinct part of the agency that is devoted to criminal law enforcement. The commission states the sole responsibility of the ECU is to conduct and participate in the detection, investigation, and prosecution of environmental crimes. The commission explains the staff of the ECU includes ten criminal investigators who are assigned only to criminal cases. The commission also informs us the ECU follows a law enforcement agency's protocol regarding the gathering and storage of evidence and information for the purpose of preserving the admissibility of evidence at a criminal trial. The commission also states the ECU case files are segregated from those of the rest of the agency. Having considered all of the submitted arguments and reviewed the related documentation the commission has provided, we conclude the commission has demonstrated the ECU is a law enforcement agency for purposes of section 552.108 of the Government Code. *See A&T Consultants v. Sharp*, 904 S.W.2d 668, 677-78 (Tex. 1995) (comptroller may withhold from disclosure audit papers pursuant to section 552.108 to protect the comptroller's interest in enforcing the tax laws); Open Records Decision Nos. 320 at 1 (1982) (Texas National Guard is law enforcement agency for purposes of statutory predecessor), 127 at 8 (1976) (arson investigation unit of fire department is law enforcement agency), 126 at 5 (1976) (Attorney General's Organized Crime Task Force is law enforcement agency).

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state Attachment F relates to an ongoing criminal investigation, and release of that information would interfere with the investigation and prosecution of the case. Based upon this representation, we conclude the release of Attachment F would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to Attachment F.

However, section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers

to the basic “front-page” information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-187; see also ORD 127 (summarizing types of information considered to be basic information). Accordingly, with the exception of basic information, which must be released, the commission may withhold Attachment F under section 552.108(a)(1) of the Government Code.

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. 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 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 state the information you marked and indicated reveals the identities of complainants who reported possible violations of the state’s environmental regulations to the commission, which is the entity with the authority and duty to enforce such violations. See Water Code § 26.121. You explain the alleged violations carry civil and administrative penalties. See *id.* §§ 7.052, .102, .187. Finally, you state there is no indication the subject of the complaint knows 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 some of the information at issue. Therefore, the commission may withhold the information you marked in attachment C and the information we marked in Attachment E under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. However, we find you have not demonstrated any of the remaining information at issue identifies an individual who reported a violation of law for purposes of the informer’s privilege. Accordingly, the commission may not withhold any of the remaining information under section 552.101 on that basis.

In summary, excluding basic information, which must be released, the commission may withhold Attachment F under section 552.108(a)(1) of the Government Code. The commission may also withhold the information you marked in attachment C and the information we marked in Attachment E under section 552.101 of the Government Code in

conjunction with the common-law informer's privilege. 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.

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, 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,



Matthew Taylor
Assistant Attorney General
Open Records Division

MT/dls

Ref: ID# 606949

Enc. Submitted documents

c: Requestor
(w/o enclosures)