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ATTORNEY GENERAL OF TEXAS

September 1, 2017

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

OR2017-20082

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# 674031 (PIR # 17-34161).

The Texas Commission on Environmental Quality (the "commission") received a request for complaints and related investigation reports pertaining to a specified landfill during a specified time period.¹ You state you have released some information. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the instant request because it does not consist of complaints or investigation reports pertaining to the specified landfill during the specified time period. This ruling does not address the public availability of the non-responsive information, which we have indicated, and the commission need not release it in response to the request.

¹We note the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify 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).

Next, we note some of the submitted responsive information falls within the scope of section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Some of the submitted responsive information is part of a completed report subject to section 552.022(a)(1) of the Government Code. The commission must release the information at issue pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See id.* Although you seek to withhold the information under section 552.111 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to Gov't Code § 552.111 subject to waiver).* As such, section 552.111 does not make information confidential for purposes of section 552.022(a)(1). Thus, the information at issue may not be withheld under section 552.111. However, the Texas Supreme Court has held the common-law informer's privilege is other law for the purpose of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001); *Tex. Comm'n on Env'tl. Quality v. Abbott*, No. GB-300417 (126th Dist. Ct., Travis County, Tex.). Accordingly, we will consider the applicability of the common-law informer's privilege to the submitted information. Further, we will address your argument against disclosure of the responsive information not subject to section 552.022 of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the informer's privilege, which 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 from disclosure the identities of persons who report 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 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 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).

You state the information at issue reveals the identity of complainants who reported possible violations of the Texas Health and Safety Code and Texas Water Code to the commission. We understand the commission has the authority to enforce the relevant code provisions. You also state violations of the relevant code provisions carry civil penalties and are punishable by fines. We understand the subject of the complaint does not already know the identity of the informers. Based upon your 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 identifying information of the complainants within the submitted responsive information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. However, the remaining responsive information does not identify an informer, and the commission may not withhold it under section 552.101 on that basis. As you raise no further exceptions to disclosure, the commission must release the remaining responsive 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,



Sidney M. Pounds
Assistant Attorney General
Open Records Division

SMP/sdk

Ref: ID# 674031

Enc. Submitted documents

c: Requestor
(w/o enclosures)