



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN, TEXAS 78711**

**JOHN L. HILL  
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August 11, 1977

Major General Thomas S. Bishop  
The Adjutant General  
P. O. Box 5218  
Austin, Texas 78763

Open Records Decision No. 172

Re: Whether former Texas  
Army National Guard officer  
is entitled to access to  
report of investigation re-  
lating to allegations against  
him.

Dear General Bishop:

You have requested our decision under the Open Records Act, article 6252-17a, V.T.C.S., regarding whether a report of an investigation of wrongdoing on the part of a former officer of the Texas Army National Guard is excepted from required disclosure to him. The information requested is a report of an investigation which you ordered to be conducted by the Inspector General of the Department to determine the facts and circumstances surrounding allegations that the officer had abused his position by coercing women under his command to engage in sexual relations with him. The report contains the statements of 22 witnesses, a detailed summary of the accumulated evidence, and the conclusions and recommendations of the investigator. The former officer was discharged and seeks disclosure under the proviso of section 3(a)(2) of the Open Records Act, which states that

all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as is public information under the Act.

You contend that the report is excepted from disclosure under sections 3(a)(1), 3(a)(2), 3(a)(3), 3(a)(8), and 3(a)(11) of the Act.

We have broadly construed the proviso of section 3(a)(2) as making available to an employee all information relating to his employment relationship. Open Records Decision Nos. 133 (1976); 115 (1975); 31 (1974). In the present instance, however, you contend that particular information in the employee's personnel file is excepted from disclosure to him by some other provision of the Act. We are of the opinion that the report is excepted by section 3(a)(1), which excepts "information deemed confidential by law, either Constitutional, statutory, or by judicial decision," in this case, the informer's privilege.

In Open Records Decision No. 156 (1977), we applied the informer's privilege to a situation in which a complainant furnished information to a city's animal control division regarding mistreatment of a dog. Quoting Professor Wigmore, we explained that the privilege applies

wherever the situation is one where without this encouragement the citizens who have special information of a violation of law might be deterred otherwise from voluntarily reporting it to the appropriate official. Wigmore, Evidence, § 2374 at 768 (McNaughton Rev. 1961).

Article 5788, V.T.C.S., the Texas Code of Military Justice, would seem to support this rationale for the informer's privilege, by authorizing "[a]ny member of the state military forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress," to "complain to any superior commissioned officer. . . ." Sec. 138(a).

There can be no doubt that the report discloses the alleged violation of a number of provisions of Article 5788, in particular section 93, cruelty and maltreatment, section 133, conduct unbecoming an officer and a gentleman, and section 134, the general article. The report also indicates a possible violation of sections 39.01 and 39.02 of the Penal Code. Furthermore, it is evident that the informer's privilege embraces communications made to proper officials of the Texas Army National Guard, who clearly have "a duty of . . . law enforcement in their particular spheres." Wigmore, *supra*, § 2374 at 767. In addition, although the privilege normally applies only to the identity of an informant, and not to the content of his communication, the content itself is privileged when it would tend to reveal the identity of the informant. Roviaro v. United States, 353 U.S. 53, 60 (1957). In the present instance, it appears that virtually every statement made by each of the 22 informants would tend to reveal that person's identity.

Were it not for the presence of the proviso of section 3(a)(2), the informant's privilege would clearly apply to the information about which you inquire. Since both interests, the government's right to protect its confidential sources, and the employee's right to all information in his personnel file, are so significant, and since they are here in direct conflict, it is clear that we must attempt to balance these opposing interests. The United States Supreme Court in Roviaro v. United States, supra, suggested this approach in dealing with a situation in which the informer's privilege is in conflict with some other strong interest:

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Id. at 62. Professor Wigmore indicates that the privilege must yield whenever the informant is a material witness on the issue of guilt, or where the informant's credibility has been called into question. Wigmore, supra, § 2374 at 768-69. Article 5788 itself provides an exception to the privilege by preserving the right of a defendant to confront the witnesses against him in trials before a military tribunal and during pre-trial hearings. Secs. 32(b), 46(a).

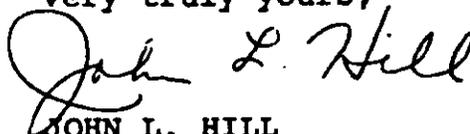
We believe that a balancing of interests in the present situation compels the withholding of the identity of these informants at this time. If the former officer had been brought to trial he would necessarily have been apprised of the identity of all witnesses who testified against him. Where the investigation does not result in a trial, however, we believe the identify of informants ought to be protected. In our opinion, to require disclosure of his identity in every instance would effectively deter a member of the state military forces from reporting a suspected violation of law by a superior officer.

In Evans v. Department of Transportation of the United States, 446 F.2d 821 (5th Cir. 1971), the Court of Appeals for the Fifth Circuit applied just such a standard in upholding the refusal by the Federal Aviation Administration to release a letter which charged an airplane pilot with acts indicative of behavior disorder and mental abnormality. The Administrator of the Agency, who relied on the law enforcement exception in the federal act, had determined that disclosure of the information would adversely affect the interest of the informant. The Court observed that, if the information were released to the pilot,

. . . few individuals, if any, would come forth to embroil themselves in controversy or possible recrimination by notifying the Federal Aviation Agency of something which might justify investigation.

Id. at 824. In our opinion, this rationale is equally applicable to the investigative report at issue here. It is our decision therefore that the report is excepted from disclosure by section 3(a)(1) of the Open Records Act, as tending to reveal the identity of informants. We note that, since this conclusion necessarily results from a balancing of the interests involved in two conflicting portions of the Open Records Act, it should not be regarded as applicable beyond the particular set of facts at issue here.

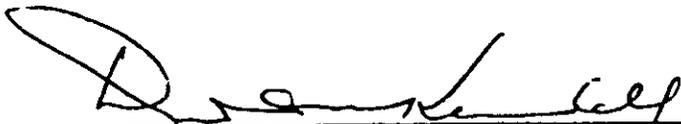
Very truly yours,



JOHN L. HILL

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APPROVED:



DAVID M. KENDALL, First Assistant



C. ROBERT HEATH, Chairman  
Opinion Committee

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