



October 30, 2001

Ms. Joan Kennerly  
Assistant City Attorney  
City of Irving  
825 West Irving Boulevard  
Irving, Texas 75060

OR2001-4961

Dear Ms. Kennerly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154120.

The City of Irving (the "city") received a request for a specific fire department investigation report. You claim that portions of the report are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that the requested documents are subject to section 552.022 of the Government Code. Section 552.022 provides, in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under 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). The submitted document is a completed report. Thus, it must be released unless it is excepted under section 552.108 or it is expressly made confidential under other law.

You claim that information identifying the witnesses to this incident is protected from disclosure under the informer's privilege. The common law informer's privilege,

incorporated into the Public Information Act by section 552.101, has long been recognized by Texas courts.<sup>1</sup> 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); see also *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege under *Roviaro* exists to protect a governmental body's interest. Therefore, the informer's privilege under *Roviaro* may be waived by a governmental body and is not "other law" that makes the information confidential under section 552.022. Open Records Decision No. 549 at 6 (1990).

The informer's privilege, however, is also found in Rule 508 of the Texas Rules of Evidence. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at \*8 (Tex. Feb. 15, 2001). Thus, we will determine whether this information is confidential under Rule 508.

Rule 508 provides, in relevant part:

(a) Rule of Privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

Thus, an informer's identity is confidential under Rule 508 if a governmental body demonstrates that an individual has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer, and the information does not fall within the exceptions to the privilege enumerated in Rule 508(c)

Rule 508(c)(1) provides that

[n]o privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the public entity.

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<sup>1</sup>Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

It appears from our review of the documents that the individual who would have cause to resent the communication is already aware of the identities of the witnesses. Therefore, the city may not withhold the witnesses' identifying information under the informer's privilege as stated in Rule 508 of the Texas Rules of Evidence.

You also assert that, in accordance with *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. – El Paso 1992, writ denied), the witnesses' identifying information should be withheld from disclosure. We note, however, that *Ellen* addressed the applicability of common law privacy to information concerning sexual harassment investigations. Since this investigation did not relate to allegations of sexual harassment, we conclude that the holding in *Ellen* is inapplicable in this instance. Therefore, since neither the city nor any interested party has submitted additional arguments explaining why the submitted information is confidential, we conclude that the submitted report must be released in its entirety. See Gov't Code § 552.304 (providing that interested party may submit comments explaining why requested information should or should not be released).

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).

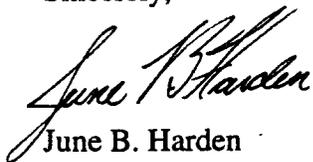
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Department of Public 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 General Services 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. 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,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/seg

Ref: ID# 154120

Enc: Submitted documents

c: Ms. Cara Battle  
1301 West Beltline, Suite 119  
Carrollton, Texas 75006  
(w/o enclosures)