



November 13, 2002

Ms. Julie B. Ross  
Karger Key Barnes & Springer, PC  
300 West Third Street, Suite 1700  
Fort Worth, Texas 76102

OR2002-6472

Dear Ms. Ross:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172098.

The City of Waxahachie (the "city"), which you represent, received a request for "all information regarding a complaint filed against Police Chief Bobby Whitmire on or about July 2002 by a non-commissioned member of his department who is now with another city department." You state that you have released some of the responsive information. You claim that the remaining responsive information, which you have marked exhibit 2, is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code and Rule 503 of the Texas Rules of Evidence. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

We note initially that exhibit 2 is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022 provides in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

---

<sup>1</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

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). Exhibit 2 constitutes a completed investigation. Accordingly, the city must release exhibit 2 under section 552.022(a)(1) unless the information is excepted from disclosure under section 552.108 or is expressly confidential under other law. You state that exhibit 2 is excepted from release pursuant to the attorney-client privilege and that the submitted information contains information excepted from release pursuant to the informer's privilege. The attorney-client privilege is incorporated into the Public Information Act (the "Act") by section 552.107 of the Government Code. Section 552.107, however, is a discretionary exception to disclosure and thus does not constitute other law that makes information expressly confidential for purposes of section 552.022(a). *See* Open Records Decision No. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107). The informer's privilege under *Roviaro v. United States*, 353 U.S. 53, 59 (1957), 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 information confidential under section 552.022. *See* Open Records Decision No. 549 at 6 (1990). Therefore, the city may not withhold any of exhibit 2 under section 552.107 or the common-law informer's privilege.

However, you assert that the submitted information is confidential under Rule 503 of the Texas Rules of Evidence. Furthermore, the informer's privilege 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*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information is confidential under Rule 503 and Rule 508.

We now consider whether Rule 503 applies to the submitted information. Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the layer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1993, no writ).

You inform this office that the city's outside counsel retained an investigative firm to conduct the investigation into the complaint, and that this firm acted "in this matter as a representative of [the outside counsel] in connection with [the outside counsel's] legal representation of the city." In addition, you state that the communication between the outside counsel and the investigative firm was "between privileged parties, reveals a confidential communication, was not intended to be disclosed to third parties, and was made in furtherance of the rendition of professional legal services to the [city]." After reviewing your arguments and the investigative report in exhibit 2, we conclude that you have demonstrated that the investigative report in exhibit 2 represents a confidential communication between a lawyer and the lawyer's representative made for the purpose of facilitating the rendition of professional legal services to the client. Thus, the city may withhold the investigative report contained in exhibit 2, which we have marked, under Rule 503(b)(1).

We now consider whether the remainder of exhibit 2, which consists of statements of city employees and a page of notes, is excepted from release pursuant to Rule 503. In an attached

affidavit, you state that city employees who provided the statements in exhibit 2 were required to provide these statements to other city employees as a part of the city's investigation regarding the complaint. Thus, you have established that the statements of city employees represent communications between privileged parties, and you have identified the parties involved in the communications. However, you have failed to establish that the statements of the city employees were made for the purpose of facilitating the rendition of professional legal services to the city. Accordingly, you may not withhold the statements pursuant to Rule 503. Additionally, the page of notes which you refer to as a "representative sample of investigator's notes" is not a communication for purposes of Rule 503, and so is not excepted from release under the attorney-client privilege.

We now address whether Rule 508 applies to portions of the submitted information. 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 or member of a legislative committee or its staff conducting an investigation, and the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 508(c).

Although you assert that the submitted information describes conduct that violates the law, you do not identify the specific provision of law that allegedly was violated. Furthermore, you do not demonstrate, nor does it appear to this office, that this information was furnished to "a law enforcement officer or member of a legislative committee or its staff conducting an investigation." Thus, you have not established the applicability of Rule 508 to the handwritten page of notes or to the employee statements.

Since section 552.108 excepts information from release that is subject to section 552.022(a)(1), we will now consider whether the investigator's handwritten page of notes or the employee statements may be withheld pursuant to section 552.108 of the Government Code. Section 552.108(a)(2) excepts from required public disclosure "[i]nformation held by a law enforcement agency... that deals with the detection, investigation, or prosecution of crime... if... it is information that deals with the detection,

investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication." You assert that the submitted information relates to an investigation into allegations of criminal behavior made against Chief Whitmire. You further explain that this investigation was conducted by the investigating firm hired by the city because "the allegation was made against the Chief of Police personally [so] it was determined that [the] allegation could not be investigated by the [police department]." We note that the city is not a law enforcement agency. Furthermore, the investigation at issue was administrative, as opposed to criminal, in nature. Based on our review of your arguments and the submitted information, we find no evidence that this investigation resulted in any criminal investigation of Chief Whitmire. See *Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied) (section 552.108 not applicable where no criminal investigation or prosecution of police officer resulted from investigation of allegation of sexual harassment); see also Open Records Decision No. 350 (1982) (predecessor provision of section 552.108 not applicable to Internal Affairs Division investigation file when no criminal charge against officer results from investigation of complaint against police officer). Because the city is not a law enforcement agency and the information does not deal with an investigation of crime, you may not withhold the submitted page of notes or the employee statements from disclosure pursuant to section 552.108.

As section 552.101 can provide a source of other law for purposes of section 552.022, we will now consider whether the investigator's handwritten page of notes or the employee statements must be withheld pursuant to section 552.101 of the Government Code. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. However, the scope of public employee privacy is narrow and there is a legitimate public interest in a public employee's job performance. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of employee privacy is narrow). Upon review of the submitted information, we find that it does not contain the type of information the release of which would be highly objectionable to a reasonable person. Furthermore, as the submitted information relates to the performance of public employees, we find that there is

a legitimate public interest in the submitted information. Accordingly, you may not withhold the handwritten page of notes or the employee statements pursuant to section 552.101.

In summary, you may withhold the pages that we have marked pursuant to Rule 503. You must release the remaining submitted information.

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).

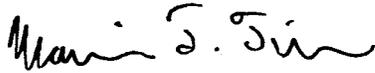
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Maverick F. Fisher  
Assistant Attorney General  
Open Records Division

MFF/seg

Ref: ID# 172098

Enc: Submitted documents

c: Ms. JoAnn Livingston  
Managing Editor  
Waxahachie Daily Light  
P.O. Box 877  
Waxahachie, Texas 75165  
(w/o enclosures)