



OFFICE of *the* ATTORNEY GENERAL  
GREG ABBOTT

May 23, 2003

Ms. Ashley D. Fourt  
Assistant District Attorney  
County of Tarrant  
401 W. Belknap  
Fort Worth, Texas 76196-0201

OR2003-3498

Dear Ms. Fourt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181531.

The Tarrant County Sheriff's Department (the "department") received a request for a specified internal affairs investigation. You claim that the requested 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 information.

We begin by noting that the requested records include information obtained during the course of a polygraph examination. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by statutes outside of the Public Information Act (the "Act"). Section 1703.306 of the Occupations Code governs information obtained during the course of a polygraph examination and provides in pertinent part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

Occ. Code § 1703.306(a)(1). Here, the requestor is the examinee. Access to polygraph information is governed by section 1703.306 of the Occupations Code. *See* Occ. Code § 1703.306. Section 1703.306(a)(1) expressly provides the examinee with access to the information. Accordingly, the department must release to the requestor his polygraph information without redactions.

We turn now to the remaining submitted information. We note that the submitted information is specifically made public under section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. The information that you submitted to us for review consists of a completed report or investigation that falls into one of the categories of information made expressly public by section 552.022. *See* Gov't Code section 552.022(a)(1). Section 552.022(a)(1) states that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it is excepted under section 552.108 of the Government Code or is expressly confidential under other law. You contend that section 552.101 of the Government Code in conjunction with the informer's privilege and section 552.108 of the Government Code make this information confidential.

The common law informer's privilege, incorporated into the Act by section 552.101 of the Government Code, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *see also Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928); *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege under *Roviaro* exists to protect a governmental body's interest. Thus, it 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). But in *In re The City of Georgetown*, 53 S.W.3rd 328 at 337 (Tex. 2001), 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." Rule 508 of the Texas Rules of Evidence 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). In this instance, however, the individuals whose identities you seek to withhold under the informer's privilege did not provide information to the department in connection with an investigation of a possible violation of law, but rather in connection with an administrative internal affairs investigation. Therefore, the information may not be withheld under Rule 508 of the Texas Rules of Evidence.

Section 552.108 provides in relevant part:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime;

(2) 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[.]

....

- (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

....

A governmental body that raises section 552.108 must reasonably explain, if the responsive information does not supply the explanation on its face, how and why section 552.108 is applicable to that information. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision Nos. 562 at 10 (1990), 434 at 2-3 (1986).

You assert that “the requested information pertains to the identity and circumstances surrounding the use of a confidential informant that led to an IAD investigation of a [department] jailor.” We note, and you acknowledge, that information about complaints against peace officers generally may not be withheld under section 552.108. For example, the names of complainants, the names of the officers who are the subjects of complaints, an officer’s written response to a complaint, and the final disposition of a complaint generally are not excepted from disclosure by section 552.108. Open Records Decision Nos. 350 at 3 (1982), 342 at 2 (1982), 329 at 2 (1982). In certain cases, the identities of witnesses, informants, and persons interviewed in the course of a police internal investigation may be withheld under section 552.108 if the police department determines that disclosure either might subject these individuals to possible intimidation or harassment or might harm the prospects of future cooperation. Open Records Decision Nos. 329 at 2 (1982), 313 at 2-3 (1982), 297 at 2 (1981), 252 at 4 (1980). However, section 552.108 is inapplicable where a complaint against a law enforcement officer does not result in a criminal investigation or prosecution. *Morales v. Ellen*, 840 S.W.2d 519, 525-526 (Tex. App.—El Paso 1992, writ denied) (construing statutory predecessor); Open Records Decision No. 350 (1982) (stating that statutory predecessor was not applicable to internal affairs investigation file when no criminal charge against police officer results from investigation). In this case, the submitted information relates to an internal affairs investigation of violations of departmental policy, rather than to a criminal investigation. Investigations into non-criminal matters are not excepted from disclosure by section 552.108 of the Government Code. *Morales v. Ellen*, 840 S.W.2d at 526 (predecessor statute to section 552.108 not applicable where no criminal investigation resulted). Because the submitted information does not relate to a criminal investigation, we find that the submitted information is not excepted from disclosure under section 552.108, and it must be released.<sup>1</sup>

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<sup>1</sup>We note that some of the submitted information may be confidential and not subject to release to the general public. *See* Gov’t Code § 552.023. However, the requestor in this instance has a special right of access to the information. Gov’t Code § 552.023. Because some of the information may be confidential with respect to the general public, if the department receives a further request for this information from an individual other than this requestor or his authorized representative, the department should again seek our decision.

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 Dep't of Pub. 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,



W. Montgomery Meitler  
Assistant Attorney General  
Open Records Division

WMM/lmt

Ref: ID# 181531

Enc: Submitted documents

c: Mr. Hurford B. Thom  
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Arlington, Texas 76017  
(w/o enclosures)