



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

September 4, 2003

Mr. Reagan E. Greer
Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR2003-6207

Dear Mr. Greer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187153.

The Texas Lottery Commission (the "commission") received a request for "any and all complaints pertaining to, and any results from any investigations or actions taken by the [commission], or any law enforcement agency or security division of any state agency in relationship with any such complaints in association with [eight specified bingo establishments] from January 1, 1999 to June 1, 2003." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the information at issue is subject to section 552.022 of the Government Code, which provides in relevant part:

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[.]

The submitted information consists of completed investigative reports. This information must be released unless it is excepted under section 552.108 or confidential under other law. Section 552.103 of the Government Code is a discretionary exception that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the submitted documents may not be withheld under section 552.103 of the Government Code.

You have marked information in Exhibit D that you contend is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the informer's privilege. The common-law informer's privilege is 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); *see also Roviario v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege under *Roviario* exists to protect a governmental body's interest. Therefore, the common-law informer's privilege may be waived by a governmental body and is not "other law" that makes the information confidential for purposes of section 552.022. Open Records Decision No. 549 at 6 (1990).

We note, however, that the informer's privilege is also found in Rule 508 of the Texas Rules of Evidence. The Texas Supreme Court has 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). 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 individual's identity is confidential under Rule 508 if a governmental body demonstrates that the 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, the individual whose identity you seek to withhold under the informer's privilege provided information to the commission in connection with an investigation of a possible violation of law. None of the exceptions in Rule 508(c) apply in this instance. Accordingly, we agree that information identifying the individual is excepted from disclosure under section 552.101 of the Government Code in conjunction with Rule 508 of the Texas Rules of Evidence.

Next, you contend that the investigation documents submitted as Exhibits B and C are excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You indicate that Exhibits B and C relate to pending criminal prosecutions. Based on your representations and our review, we determine that the release of Exhibits B and C would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. We believe such basic information refers to the information held to be public in *Houston Chronicle*, 531 S.W.2d 177. *See* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, the commission must release basic information from the investigations in Exhibits B and C. Although section 552.108(a)(1) authorizes you to withhold the remaining information in Exhibits B and C from disclosure, you may choose to release all or part of Exhibits B and C that is not otherwise confidential by law. *See* Gov't Code § 552.007.¹

In summary, most of the information identifying an informer in Exhibit D, which you have marked, must be withheld under section 552.101 of the Government Code in conjunction with Rule 508 of the Texas Rules of Evidence. We have marked a small portion of this information which does not identify an informer and which must be released, along with the remainder of Exhibit D. With the exception of basic information, which must be released,

¹Based on this finding, we do not reach your other arguments against disclosure for the information in Exhibits B and C.

the commission may withhold the information in Exhibits B and C pursuant to section 552.108(a)(1) of the Government Code.

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,

A handwritten signature in black ink, appearing to read "Sarah Swanson", written in a cursive style.

Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/DRS/seg

Ref: ID# 187153

Enc: Submitted documents

c: Mr. Kevin Keller
20 Bristol Green
San Antonio, Texas 78209
(w/o enclosures)