



April 20, 2001

Mr. Ric Gonzalez  
Assistant City Attorney  
City of Lewisville  
P.O. Box 299002  
Lewisville, Texas 75029-9002

OR2001-1587

Dear Mr. Gonzalez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146253.

The City of Lewisville (the "city") received a request for information concerning an incident involving a police officer who allegedly struck a prisoner. You state that you have released much of the requested information but with certain portions of it redacted. You claim that the redacted information, which you have marked, is excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy, constitutional privacy, and the informer's privilege. You also claim that some of the requested information is criminal history information that is protected from disclosure by section 552.108 of the Government Code and by federal law. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

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

---

<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.

(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). All of the submitted documents appear to be a part of a completed investigation made by the city. These documents must therefore be released in their entirety under section 552.022, unless the redacted information is excepted from disclosure under section 552.108 or is expressly made confidential under other law.

You claim that some of the information 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,<sup>2</sup> has long been 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 informer's privilege under *Roviario* 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. Recently, 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 the 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.

---

<sup>2</sup>Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

(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). The subject of the complaint already knows the identity of the complainant. 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.

Therefore, in this instance, the identity of the person who furnished the information is not protected under the informer's privilege as stated in Rule 508 of the Texas Rules of Evidence. *See also* Gov't Code § 552.108(c) (stating that "basic information" is not excepted under section 552.108); *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); Open Records Decision No. 127 (1976) (summarizing types of information considered basic information, including identity and description of complainant).

Next, we consider your privacy claims, since they are "other law" for purposes of section 552.022. Section 552.101 encompasses the doctrines of common law and constitutional 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. This office has found that the following types of information are excepted from required public disclosure under constitutional or common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990),

information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Based on our review of the submitted information, we find that some of it is protected from disclosure under common law privacy. We have marked the information that you may withhold under section 552.101 in conjunction with common law privacy. Because this disposes of the information that might otherwise be protected by constitutional privacy, we need not address that question of law. *See* Open Records Decision No. 455 at 5 (1987) (recognizing that the scope of information protected under constitutional privacy is narrower than that of common law privacy).

Finally, you claim that some of the submitted information is criminal history information that is protected by section 552.108 of the Government Code and by federal law. We note, however, that section 552.108 does not apply to criminal history information. It protects the interests of law enforcement agencies and prosecutors, not the interests of individuals with criminal history records. A governmental body that wishes to protect criminal history information from disclosure should, instead, raise section 552.101 of the Government Code in conjunction with relevant provisions of state and federal law.

Federal regulations, incorporated into the Public Information Act by section 552.101, prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety (“DPS”) is confidential. Gov’t Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). You have not, however, submitted any CHRI to this office. If you have CHRI in your possession that falls within the ambit of these state and federal regulations, you must withhold that information from the requestor.

To summarize, the submitted documents appear to be part of a completed investigation by the city and are therefore made public by section 552.022(a)(1). The informer’s privilege set forth in Rule 508 of the Texas Rules of Evidence is “other law” for purposes of section 552.022. You may not, however, withhold any of the submitted information under Rule 508, since it appears that the subject of the complaint already knows the informer’s identity. Common law and constitutional privacy are also “other law” for purposes of section 552.022. We find that some of the submitted information, which we have marked, is protected under common law privacy. Because constitutional privacy is narrower than

common law privacy, we need not address whether it applies to the information. Finally, you have not submitted any CHRI to this office. If you have CHRI in your possession, you must withhold that information in accordance with the applicable state and federal laws. Therefore, with the exception of the information that we have marked as protected under common law privacy, all of the submitted information must 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,



Stephen P. Agan  
Assistant Attorney General  
Open Records Division

SPA/seg

Ref: ID# 146253

Encl. Submitted documents

cc: Mr. Reese Dunklin  
Staff Writer  
Dallas Morning News  
100 W. Oak Street, Suite 318  
Denton, Texas 76201  
(w/o enclosures)