



December 5, 2001

Mr. Gary L. Warren Sr.
Executive Director
Texas Commission on Fire Protection
P.O. Box 2286
Austin, Texas 78768-2286

OR2001-5659

Dear Mr. Warren:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155726.

The Texas Commission on Fire Protection (the "commission") received a request for information relating to an investigation of a fire department. You state that the commission is releasing some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code and Texas Rule of Evidence 508. We have considered your arguments and have reviewed the information you submitted.

We first note that the requested information is subject to section 552.022 of the Government Code. Section 552.022 provides that

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). You state that the requested information relates to an investigation that the commission had completed prior to its receipt of the request for this information. Therefore, the commission must release the requested information, unless it is excepted from disclosure under section 552.108 or expressly confidential under other law. Texas courts have long recognized the common law informer's privilege, as incorporated

into chapter 552 of the Government Code by section 552.101.¹ 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 information confidential under section 552.022. See Open Records Decision No. 549 at 6 (1990). Section 552.103 is a discretionary exception to disclosure and thus also is not other law that makes information confidential under section 552.022. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived). Therefore, the commission may not withhold any of the submitted information under the common law informer's privilege or section 552.103.

The informer's privilege also is found in rule 508 of the Texas Rules of Evidence. The Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." See *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether any of the submitted 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 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).

¹Section 552.101 exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

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." Therefore, we do not believe that the identity of the persons who furnished the information at issue is protected under the informer's privilege as stated in rule 508 of the Texas Rules of Evidence.

We note, however, that the submitted information contains a driver's license number. Section 552.130 of the Government Code excepts from disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). The commission must withhold a Texas driver's license number under section 552.130. The rest 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).

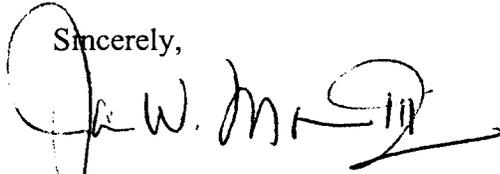
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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); *Tex. 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. 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 "J.W. Morris III", written over a circular stamp or mark.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 155726

Enc: Submitted documents

c: Captain William Sano
San Antonio Fire Department
515A South Frio
San Antonio, Texas 78207
(w/o enclosures)