



December 19, 2001

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

OR2001-5966

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# 156350.

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 portions of the remaining requested information are 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 note that you have previously sought a decision from this office with respect to the information submitted as Exhibits B and C. In Open Records Letter No. 2001-5659 (2001), we concluded that the commission was required to withhold a driver's license number under section 552.130, but that it could not withhold the remaining requested information. Therefore, as the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, we conclude that we need not revisit the information in Exhibits B and C.¹ The commission must release or withhold those documents in accordance with Open Records Letter No. 2001-5659 (2001). *See Gov't Code* § 552.301(f); Open Records Decision No. 673 (2001).

¹The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See Open Records Decision No. 673 (2001).*

Next, we address your arguments with respect to the information in Exhibits A and D. We 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 indicate 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 552.101.² 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). Therefore, the commission may not withhold any of the information in Exhibits A and D under the common law informer's privilege.

The informer's privilege is also 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 information in Exhibits A and D for which you claim an exception to disclosure 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.

²Section 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).

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. Accordingly, the commission must release the information in Exhibits A and D.

To summarize, we conclude that: (1) with respect to the information in Exhibits B and C, the commission must comply with Open Records Letter No. 2001-5659 (2001); and (2) the commission must release the information in Exhibits A and D.

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,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 156350

Enc: Submitted documents

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