



February 7, 2002

Ms. Jan Clark  
Assistant City Attorney  
City of Houston - Legal Department  
P.O. Box 1562  
Houston, Texas 77251-1562

OR2002-0581

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158286.

The City of Houston (the "city") received a request for information about an unnamed city employee who allegedly sent an offensive email to a fellow co-worker. 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 information submitted as Exhibits 2 and 3.

Initially, we address your contention that the request for information is unclear and that the city had to investigate to determine which employee was referred to in the request. With respect to this contention, we note that a governmental body must make a good faith effort to relate a request to information it holds. Open Records Decision No. 561 (1990). In this case, it is clear that the city made such an effort and was able to locate responsive information. We will, therefore, address the applicability of the exceptions you raise to the information submitted.

We note that Exhibit 2 is subject to section 552.022 of the Government Code. Section 552.022 of the Government Code makes certain information expressly public. One such category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). Thus, a governmental body must release a completed investigation unless the information is excepted under section 552.108 or is confidential by law. You argue that both Exhibits 2 and 3 are excepted from disclosure under section 552.108(a)(1). 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).

Here, you state that Exhibit 3 pertains to a pending criminal investigation. Based on this representation, we conclude that the release of Exhibit 3 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). On the other hand, the investigation in Exhibit 2 is clearly an administrative investigation, and while you state that Exhibit 2 was requested by and provided to the Federal Bureau of Investigation (“F.B.I.”), we have not received any representation from the FBI that it seeks to withhold the information at issue. *See* Open Record Decision Nos. 372 (1983) (deciding that where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 108 may be invoked by any proper custodian of information that relates to the incident), 474 (1987) (same), 586 (1991) (deciding that the need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108). Thus, you may not withhold Exhibit 2 in its entirety under section 552.108(a)(1). However, you assert that certain portions of Exhibit 2 relate directly to the pending criminal investigation documented in Exhibit 3. We have marked the portions of Exhibit 2 that relate directly to Exhibit 3, and you may withhold those marked portions under section 552.108(a)(1).

You also claim that portions of Exhibit 2 are excepted from disclosure pursuant to the informer’s privilege. The informer’s privilege, incorporated into the Public Information Act by section 552.101,<sup>1</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).

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<sup>1</sup>Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

However, the informer's privilege 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*, 53 S.W.3d 328 (Tex. 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.

(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 statements at issue here were made to "a law enforcement officer or member of a legislative committee or its staff conducting an investigation." Moreover, it does not appear to us that any of the exceptions enumerated in Rule 508(c) apply to this situation. Therefore, the identity of the person who furnished the information is protected under the informer's privilege as stated in Rule 508 of the Texas Rules of Evidence. We have marked the information in Exhibit 2 that is confidential under Rule 508.

Section 552.117 may also be applicable to some of the submitted information in Exhibit 2. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the city must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these

employees have family members. The city may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We have marked the possible section 552.117 information.

In sum, the city may withhold Exhibit 3 and certain marked portions of section Exhibit 2 under section 552.108(a)(1). Also, the city may withhold other marked information under Rule 508. In addition, the city may have to withhold information marked under section 552.117. The remaining information in Exhibit 2 must be released to the requestor.

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).

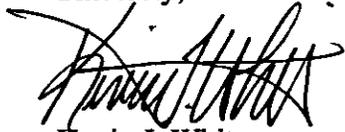
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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 "Kevin J. White", written over a horizontal line.

Kevin J. White  
Assistant Attorney General  
Open Records Division

KJW/sdk

Ref: ID# 158286

Enc. Submitted documents

c: Ms. Lisa M. Neelley  
5973 Woodway Drive  
Houston, Texas 77057  
(w/o enclosures)