



February 11, 2002

Mr. G. Chadwick Weaver  
First Assistant City Attorney  
City of Midland  
P.O. Box 1152  
Midland, Texas 79702-1152

OR2002-0612

Dear Mr. Weaver:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158412.

The City of Midland Police Department (the “department”) received a request for all police reports from 1991 to 2001 regarding incidents at a specific address as well as incidents involving one of two named individuals. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(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). The submitted information consists of twelve completed reports. Consequently, this information must be released unless it is confidential under other law or excepted from disclosure under section 552.108. You claim that some of the information is protected from disclosure under 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). 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. Furthermore, we will address the remainder of your arguments under sections 552.101, 552.108, and 552.130 of the Government Code.

We begin by addressing whether any of the submitted information is protected under Texas Rule of Evidence 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). Although you contend that some of the submitted information is excepted from disclosure under the informer's privilege, you do not specifically identify any informers in the submitted information. Consequently, you have not demonstrated that any of the submitted information is excepted from disclosure under Texas Rule of Evidence 508.

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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."

Next, we address your contention that the submitted information is confidential under common-law privacy and therefore excepted from disclosure under section 552.101 of the Government Code. Section 552.101<sup>2</sup> encompasses the doctrine of common-law privacy. For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). In this instance, although the requestor asks for all information concerning certain individuals, he also seeks all information regarding incidents at a specific address. The request regarding incidents at a specific address does not implicate any individual's privacy rights. Therefore, none of the information responsive to this portion of the request is protected as a compilation of criminal history. Furthermore, the named individuals are not listed as suspects in any of the remaining information. Therefore, we find that none of the information implicates an individual's right to privacy as a compilation of criminal history information.

Nevertheless, we find that a portion of the submitted information is protected under common-law privacy on a different ground. 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. We have marked the information that is confidential under common-law privacy and must be withheld.

Section 552.101 also encompasses information protected by other statutes. Prior to its repeal by the Seventy-fourth Legislature, section 51.14(d) of the Family Code provided for the confidentiality of juvenile law enforcement records. Law enforcement records pertaining to conduct occurring before January 1, 1996, are governed by the former section 51.14(d), which was continued in effect for that purpose. Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 100, 1995 Tex. Gen. Laws 2517, 2591 (Vernon).

This office has concluded that section 58.007 of the Family Code, as enacted by the Seventy-fourth Legislature, does not make confidential juvenile law enforcement records relating to conduct that occurred on or after January 1, 1996. Open Records Decision No. 644 (1996). The Seventy-fifth Legislature, however, amended section 58.007 to once again make juvenile law enforcement records confidential effective September 1, 1997. Act of June 2, 1997, 75th

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

Leg., R.S., ch. 1086, 1997 Tex. Sess. Law Serv. 4179, 4187 (Vernon). It chose not to make this most recent amendment retroactive in application. Consequently, law enforcement records pertaining to juvenile conduct that occurred between January 1, 1996 and September 1, 1997, are not subject to the confidentiality provisions of either the former section 51.14(d) or the current section 58.007 of the Family Code.

Some of the records at issue concern juvenile conduct that occurred between January 1, 1996, and September 1, 1997. This information is not confidential under either former section 51.14 or current section 58.007 of the Family Code. However, some of the records at issue relate to juvenile conduct that occurred after September 1, 1997. Furthermore, it does not appear that any of the exceptions in section 58.007 apply to these records. Therefore, the department must withhold a portion of the requested information, which we have marked, under section 58.007(c) of the Family Code and section 552.101 of the Government Code.

Next, you contend that the social security numbers contained in the submitted information are confidential under the federal Social Security Act. A social security number or "related record" may be excepted from disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You indicate that the social security numbers at issue were obtained or are maintained by the department for the purpose of obtaining criminal history information from the Department of Public Safety ("DPS"). You further indicate that section 411.086(b)(2) of the Government Code authorizes the DPS to adopt rules which may require a person requesting criminal history information about an individual to submit to the DPS identifying numbers of the individual, including social security numbers. However, you do not specifically state whether the department obtained or maintained the social security numbers at issue in order to request criminal history information from the DPS. Moreover, you do not inform us as to whether the DPS actually requires or required the department to submit the social security numbers at issue in order to request criminal history information. We find that if the department obtained or maintains the social security numbers in order to request criminal history information from the DPS, and if the DPS actually requires or required the department to submit the social security numbers with its request for criminal history information, then the social security numbers are confidential pursuant to section 405(c)(2)(C)(viii)(I) of Title 42 of the United States Code on the basis of section 411.086(b)(2) of the Government Code. If the department did not obtain or maintain the social security numbers pursuant to a provision of law enacted on or after October 1, 1990, the social security numbers are not confidential under the Social Security Act and they must be released.

You also contend that the submitted information is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 provides, in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication . . . .

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

. . . .

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication . . . .

Generally, a governmental body claiming section 552.108(a)(1) 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). On the other hand, a governmental body claiming section 552.108(a)(2) or (b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication.

You contend that "Prosecution/Investigation of the crime which forms the basis for the information contained in the records responsive to this request are still pending." Therefore, you claim that the information is excepted under section 552.108(a)(1). However, you also contend that the submitted information "is exempted from disclosure under section 552.108(a)(2) and (b)(2) . . . because the reported incident did not result in a conviction or deferred adjudication. The investigation has concluded and the case is closed." We first note that the submitted information consists of reports pertaining to twelve separate incidents. We further note that you have not adequately demonstrated that any one of these incidents either relates to an ongoing investigation or prosecution and is therefore excepted under section 552.108(a)(1) or relates to a case that has reached a final result other than conviction or deferred adjudication and is therefore excepted under section 552.108(a)(2) or (b)(2). Consequently, the department may not withhold any of the submitted information under section 552.108.

Finally, you contend that some of the submitted information is excepted from public disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Therefore, the department must withhold the Texas driver's license numbers contained in the submitted information under section 552.130.

In summary, you must withhold the records pertaining to juvenile conduct that occurred after September 1, 1997, which we have marked, under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. You must also withhold some of the submitted information under section 552.101 and the doctrine of common-law privacy. You must withhold the social security numbers in the submitted information pursuant to section 552.101 of the Government Code in conjunction with section 411.086 of the Government Code, if the department obtained or maintains the social security numbers in order to request criminal history information from the DPS, and if the DPS actually requires or required the department to submit the social security numbers with its request for criminal history information. Finally, you must withhold the Texas driver's license numbers contained in the submitted information under section 552.130 of the Government Code. You must release the remainder of the submitted information.

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).

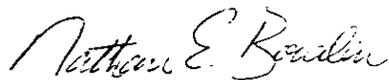
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 158412

Enc: Submitted documents

c: Mr. Herbert H. Landau  
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(w/o enclosures)