OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

September 18, 2002

Mr. Duncan R. Fox
Deputy General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2002-5269

Dear Mr. Fox:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168714.

The Texas Department of Public Safety (the "department") received a request for any records of telephone calls from Texas Ranger Frank Malinak's office and cellular telephone, or any other department telephone, since January 1, 1997. You state that the department will release some of the responsive information to the requestor. You claim, however, that portions of the requested information are excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1] We have also considered the comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Initially, we address the requestor's contention that the department failed to request a decision from this office within the ten-business-day time period mandated by section 552.301 of the Government Code. Section 552.301(b) of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth business day after the date of receiving the written request. You state that the department received the present request on July 1, 2002. The requestor, however, contends that the department actually received his request on June 29, 2002. The requestor provides a copy of a Domestic Return Receipt that was signed by a department employee on June 29, 2002. However, there is no indication on

[1]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.

the request letter received by the department that this Domestic Return Receipt corresponds to the present request. Further, we note that we cannot resolve disputes of fact in the open records process, and therefore, we must rely on the representations of the governmental body requesting our opinion. Open Records Decision Nos. 554 (1990), 552 (1990). Therefore, we find that the department requested a decision from this office within the ten-business-day time period mandated by section 552.301.

Next, we note that the submitted information consists of an itemized cellular telephone bill. Section 552.022(a) of the Government Code provides in pertinent part:

> 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*:
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> . . . .
>
> (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body.

Gov't Code § 552.022(a)(3) (emphasis added). We conclude that the submitted bill, in its entirety, is "information in an account, voucher, or contract relating to the . . . expenditure of public funds," and therefore, as prescribed by section 552.022, the bill must be released to the requestor unless it is expressly made confidential under other law. You argue that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We note, however, that section 552.108 is a discretionary exception under the Public Information Act (the "Act") and, as such, does not make information confidential.[2] *See* Open Records Decision No. 586 (1991) (governmental body may waive section 552.108).

In addition, however, you also argue that release of the itemized phone bill would reveal the identities of confidential informants. We therefore understand you to be raising the informer's privilege aspect of section 552.101. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The informer's privilege, incorporated into the Act by section 552.101, has long been

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[2] Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

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 Roviaro v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege under *Roviaro* exists to protect governmental bodies' interests. Therefore, it may be waived by the governmental body. Open Records Decision No. 549 at 6 (1990). Consequently, the informer's privilege under *Roviaro* is not "other law" that makes the information confidential under section 552.022. But in the recent case of *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001), 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." Rule 508 of the Texas Rules of Evidence 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.
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> (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.

You inform us that Ranger Malinak uses both his office and cellular phone in the performance of his official duties, and in so doing, he makes calls to and receives calls from witnesses and/or confidential informants. You explain that if an individual's telephone number is released, it is not difficult to match the telephone number with the identity of the individual. You argue that this could place a confidential informant in danger and would make it very difficult for law enforcement to obtain the cooperation of confidential informants in the future. Based on your arguments, we agree that release of the phone numbers of confidential informants and witnesses from the cellular phone bill at issue would "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." Therefore, we conclude that the department may withhold this information under Rule 508 of the Texas Rules of Evidence.

With respect to the remaining telephone numbers in the submitted bill, we address your argument that all of the telephone numbers in the submitted document should be withheld under section 552.101 in order to protect the individuals to whom the telephone numbers correspond. Section 552.101 encompasses the common-law right to privacy. Judicial decisions hold that information is protected by common-law privacy 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has also recognized that the release of personal information can constitute "a clearly unwarranted invasion of personal privacy"

under "special circumstances." Open Records Decision No. 123 (1976). An imminent threat of physical danger, as opposed to a generalized and speculative fear of harassment or retribution, is one such "special circumstance." Open Records Decision No. 169 (1977). A determination of "special circumstances" can only be made on a case-by-case basis, with the initial determination made by the governing body. *Id.* at 7. You argue that, as the requestor has already been accused of using a telephone to threaten public officials, "it is not unreasonable to believe that he constitutes a specific threat to the individuals whose telephone numbers appear on the requested invoices." You claim that the requestor could use the telephone numbers in the requested invoices to harass, threaten, or intimidate these individuals. After considering your arguments and reviewing the submitted information, we find that you have not demonstrated an imminent threat of physical danger that would constitute such "special circumstances." Thus, the remaining telephone numbers in the submitted invoice may not be withheld under section 552.101.

We note, however, that some of the telephone numbers in the submitted information may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(2) excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Therefore, if the submitted invoice includes Ranger Malinak's home telephone number or private cellular telephone number, the telephone numbers of any of his family members, or the home telephone numbers or private cellular telephone numbers of other law enforcement officers employed by the department, such information must be withheld under section 552.117(2).

To summarize, we conclude that: (1) the department may withhold the phone numbers of confidential informants and witnesses in the submitted invoice under Rule 508 of the Texas Rules of Evidence; and (2) if the submitted invoice includes Ranger Malinak's home telephone number or private cellular telephone number, the telephone numbers of any of his family members, or the home telephone numbers or private cellular telephone numbers of other law enforcement officers employed by the department, such information must be withheld under section 552.117(2). The remaining 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 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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# 168714

Enc: Submitted documents

c: Mr. Richard Surovik
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(w/o enclosures)