



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 8, 2003

Mr. Clark H. McCoy, Jr.
Wolfe, Tidwell & McCoy, L.L.P.
123 North Crockett Street, Suite 100
Sherman, Texas 75090

OR2003-2372

Dear Mr. McCoy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179047.

The Grayson County Sheriff's Office (the "sheriff"), which you represent, received a request for all information concerning a specified internal affairs investigation. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note at the outset that the requested information is specifically made public under section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part as follows:

(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. [Emphasis added.]

The submitted documents constitute a completed investigation made public under section 552.022(a)(1). Therefore, the sheriff may withhold the requested records only if they are made confidential under other law. Although you argue that the requested records are excepted under section 552.111 of the Government Code, this provision is a discretionary exception and therefore is not "other law" for purposes of section 552.022. See Open Records Decision No. 473 (1987) (governmental body may waive section 552.111).

You also claim that the identities of informers are protected from disclosure under the informer's privilege as incorporated into section 552.101 of the Government Code.¹ The informer's privilege 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. 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 witnesses' identities are made 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.
[Emphasis added.]

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 an exception to the privilege enumerated in Rule 508(c). In this instance, however, the individuals whose identities you seek to withhold under the informer's privilege did not provide information to the sheriff in connection with a possible violation of law, but rather in connection with an administrative internal affairs investigation. We therefore conclude that the information you seek to withhold is not protected under the informer's privilege as provided in Rule 508 of the Texas Rules of Evidence.

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

However, we note that the submitted documents contain personal information that is potentially confidential under section 552.117 or section 552.1175 of the Government Code. As sections 552.117 and 552.1175 are intended to protect a person's privacy, the requestor has a right of access to his own personal information under section 552.023 of the Government Code.² Therefore, you may not withhold the requestor's personal information. Section 552.117(2) excepts from disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175. Section 552.117(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We have marked the information that the sheriff must withhold under section 552.117(2) if it relates to a peace officer as defined by article 2.12 of the Code of Criminal Procedure.

In the event that section 552.117(2) is not applicable to the marked information, it may be excepted from disclosure under section 552.1175. This exception provides in part:

(a) This section applies only to:

...

(2) county jailers as defined by Section 1701.001, Occupations Code[.]

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

²Section 552.023 grants a special right of access to a person or a person's authorized representative to records that contain information relating to the person that is protected from public disclosure by laws intended to protect that person's privacy interests. If the sheriff receives another request for this same information from a different requestor, the sheriff should submit the information to us and request another ruling.

If the individual who is the subject of the submitted information is a county jailer as defined by section 1701.001 of the Occupations Code, then the information that we have marked comes within the scope of section 552.1175. You do not state, however, nor do the submitted documents indicate, whether the individual in question elected to keep the marked information confidential in accordance with section 552.1175(b). Nevertheless, the sheriff must withhold that information if the individual to whom the information pertains elected confidentiality for the information in accordance with section 552.1175.

If neither section 552.117(2) nor section 552.1175 is applicable to the marked information, the sheriff may be required to withhold the information under section 552.117(1) if the employee to whom the information pertains timely requested confidentiality for the information under section 552.024. Whether a particular item of information is protected by section 552.117 must be determined at the time that the governmental body receives the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, if the individual whose information is at issue requested confidentiality for the marked information under section 552.024 before the sheriff received the request for the information, then the sheriff must withhold the marked information under section 552.117(1). The sheriff may not withhold the marked information under section 552.117(1) if the former employee did not make a timely election under section 552.024 to keep the information confidential.

In summary, we have marked the information that the sheriff must withhold under section 552.117(2) if it relates to a peace officer as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the peace officer complies with sections 552.024 or 552.1175. The sheriff may also be required to withhold this same information under section 552.1175 if it relates to a county jailer under section 1701.001 of the Occupations Code and if the person to whom the information relates elected to keep the information confidential in accordance with section 552.1175. This same information may also be excepted from disclosure under section 552.117(1) if the person to whom it relates made a timely election under section 552.024 to keep the information confidential. You must release the remainder of the information 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).

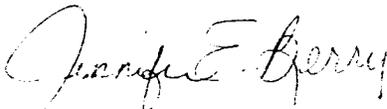
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 179047

Enc: Submitted documents

c: Mr. Carl Motley
Grayson County Sheriff's Department
Correctional Division
200 South Crockett Street
Sherman, Texas 75090
(w/o enclosures)