



RQ-819

# Texas Rehabilitation Commission

"A Human Energy Agency"

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Commissioner

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Opinion Committee

The Honorable Dan Morales  
Attorney General of Texas  
Office of the Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711

CW  
MC-33870-95  
33870

FILE

I.D. #

Dear General Morales:

Pursuant to the Constitution of the State of Texas, and §402.042 of the Government Code, I request an opinion on the following matter of importance to the Texas Rehabilitation Commission. Your assistance is needed in resolving concerns which have been identified by the Texas Rehabilitation Commission (TRC or the Commission) relating to the Texas Open Records Act. Texas Open Records Act, Texas Gov't Code Ann. §§552.001-552.353 (1994). Neither the Open Records Act nor its related opinions and decisions specifically address the issues with which we have questions. Although, at a glance, it appears that this request would be better suited for the Open Government Section; however, given the fact that TRC is not requesting this opinion in response to an actual Open Records request from a member of the public but rather for the purpose of complying with future requests, the Commission has been instructed by Craig Leavers, investigator for the Open Government Section, to certify our questions directly to the Opinion Committee.

The sections in the Open Records Act with which the Commission has questions are §552.101 and §552.108, which are exceptions to the general rule of public disclosure. Our questions relate to the applicability of those exceptions to the Management Audit Division of the Texas Rehabilitation Commission. The following is a synopsis of the pertinent facts and information to assist your office in reaching a conclusion.

### TEXAS OPEN RECORDS ACT

Many observers have expressed the view that the Texas Open Records Act (the Act) is a complex piece of legislation. The Act provides that "each person is entitled, unless otherwise provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees." Tex. Gov't Code Ann. §552.001(a) (1994). (Attachment #1). There are, however, several exceptions to the general rule of disclosure.



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## INFORMER'S PRIVILEGE -- GENERAL OVERVIEW

Section 552.101 of the Act protects "information deemed confidential by law, either constitutional, statutory, or by judicial decision." Tex. Gov't Code Ann. §552.101 (1994). (**Attachment #2**). The informer's privilege is a well established aspect of §552.101 and has been recognized by the Attorney General's Office in over 25 published opinions. See e.g., Open Records Decision No. 515 (1988) and authorities cited therein. (**Attachment #3**). The informer's privilege serves to encourage the flow of information to the government by protecting the identity of the informer. Open Records Decision No. 549 (1990) at 5. (**Attachment #4**). The informer's privilege authorized a governmental body to withhold information which would reveal the identity of persons who report possible violation of law to officials charged with the enforcement of that law. See Open Records Decision No. 156 (1977). (**Attachment #5**). However, the informer's privilege serves no purpose (and is, therefore, inapplicable) in situations where the informant's identity is known by the subject of the information. Open Records Decision No. 208 (1978) at 1-2. (**Attachment #6**).

The Supreme Court explained the rationale underlying this privilege in *Roviaro v. United States*, 353 U.S. 53, 59 (1957):

What is usually referred to as the informer's privilege is in reality the *government's privilege* [as opposed to a third party's privilege] to withhold from disclosure the identity of persons who furnish information of violation of law to offices charged with the enforcement of that law ... The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of the citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. (emphasis added). (**Attachment #7**).

The Texas Rules of Criminal Evidence and Texas Rules of Civil Evidence, however, share a somewhat broader definition of a protected informer: "a person who has furnished information *relating to or assisting in an investigation* of a possible violation of law to a law enforcement officer ..." See Open Records Decision No. 515 (1988) [citing Tex. R. Crim. Evid. r. 508 (West 1988); Tex. R. Civ. Evid. r. 508 (West 1988)]. (**Attachment #3**). The language of these rules indicates that the informer's privilege protects not only the identities of those person who actually report a known violation of the law but, also, the identities of those who merely cooperate in law enforcement investigations. Open Records Decision No. 515 (1988). (**Attachment #3**).

The informer's privilege applies not only to those informants who make reports to the police or similar law enforcement agencies but, also, when the informant reports violation of statutes with civil or criminal penalties to "administrative officials have a duty of inspection ... within their respective spheres." Open Records Decision No. 515 (1988) [citing Wigmore, Evidence, §2374 at 767 (McNaughton rev. ed. 1961)]. (**Attachment #3**). If, however, an informant merely reports an administrative grievance or personnel conflict to such administrative officials, the informer's privilege would not apply, and their identities are subject to disclosure. Open Records Decision 515 (1988) [citing Open Records Decision No. 218 (1978)].





(Attachment #3). Notwithstanding the foregoing, informants are not required to specifically allege criminal violation in legal terms in order to have the benefit of the informer's privilege. Open Records Decision No. 549 (1990). (Attachment #4). If it is apparent from the context of the report that the informant is levying a criminal charge, the informer's privilege applies to keep the informant's identity confidential. *Id.* (Attachment #4).

### INFORMER'S PRIVILEGE AND MANAGEMENT AUDIT

Pursuant to §111.018(a) of the act relating to the Texas Rehabilitation Commission, TRC has the authority to conduct internal investigations as are necessary to carry out the purposes of the act. Tex. Hum. Res. Code Ann. §111.018(a) (1994). (Attachment #8). The authority to investigate is delegated to the Management Audit Division of TRC via §111.010. Tex. Hum. Res. Code Ann. §111.020 (1994). (Attachment #9). As per the Internal Auditor's Act, the TRC Board is responsible for appointing an internal auditor to investigate activities of TRC. Tex. Gov't Code Ann. §2102.006 (1994). (Attachment #10). The TRC Board designated the Management Audit Division to conduct such investigation pursuant to this authority. *Id.* (Attachment #10). Based on the authority granted in its Audit Charter, Management Audit is arguably comprised of "administrative officials having a duty of inspection ... within their respective spheres." Open Records Decision No. 515 (1988) [*citing* Wigmore, Evidence, §2374 at 767 (McNaughton rev. ed. 1961)]. (Attachment #3). As such, the informer's privilege would apply to except informants' identities from public disclosure when an informant reports violations of statutes with civil or criminal penalties to Management Audit.

The Management Audit function of TRC is an independent appraisal activity established within the Commission to conduct reviews of operations and procedures and to report findings and recommendations to the TRC Board, TRC management, and, eventually, to external auditors such as the State Auditor's Office and law enforcement. Management Audit acts as the official liaison between TRC and these external auditors. Furthermore, Management Audit personnel are granted full, free, and unrestricted access to all TRC activities, records, property, and personnel relevant to the subject under review to enable them to thoroughly conduct investigations.

The scope of the internal audit investigations of Management Audit includes (1) the examination and evaluation of the adequacy of the agency's internal control systems and (2) the quality of performance in carrying out assigned responsibilities. The scope of the examination and evaluation performed includes:

- Reviewing the reliability and integrity of financial and operating information and the means used to identify, measure, classify, and report information.
- Evaluating compliance with policies, plans, procedures, laws, and regulations.
- Determining the adequacy of controls for safeguarding assets.
- Appraising the economical and efficient use of resources.





- Reviewing operations or programs to ascertain whether results are consistent with established objectives and goals and whether the operations or programs are being carried out as planned.
- Acting as the official liaison between TRC and external auditors (i.e., the State Auditor's Office and law enforcement), including the review of their findings and follow-up on corrective action taken.
- Performing special reviews and investigations as requested by the TRC Board, Commissioner, and the Executive Deputy Commissioner.

Management Audit is the only division of TRC charged with the duty of inspecting, investigating, examining, and evaluating the adequacy and effectiveness of the Agency's internal control systems. This grant of authority imposes upon Management Audit, as "administrative officials," a duty of inspection within their respective spheres -- their "respective spheres" being the broad but limited scope of internal audit investigations. *Id.* (Attachment #3).

### LAW ENFORCEMENT EXCEPTION -- GENERAL OVERVIEW

Section 552.108 applies to a "record of a law enforcement agency or prosecutor." Tex. Gov't Code Ann. §552.108 (1994). (Attachment #11). Thus §552.108 applies to the records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce the criminal laws. *See* Texas Open Records Act Handbook, Part 2, Section H, subsection 1, at 58-59 [*citing* Open Records Decision Nos. 493 (1988) at 2; 287 (1981) at 2]. (Attachment #12). It generally does not apply to the records created by an agency whose chief function is essentially regulatory in nature. *Id.* (Attachment #12).

An administrative agency that does not qualify as a law enforcement agency may, under limited circumstances, claim that §552.108 (also known as the law enforcement exception) excepts records in its possession from public disclosure. *Id.* (Attachment #12). Records that otherwise qualify for the §552.108 exception, such a documentary evidence in a police file, do not necessarily lose that status while in the custody of an administrative agency not directly involved with law enforcement. *Id.* at 59 [*citing* Open Records Decision No. 272 (1981) at 1-2]. (Attachment #12).

If an investigation by an administrative agency reveals possible criminal conduct that the agency *intends to report* (or has already reported) to the appropriate law enforcement agency, then §552.108 will apply to the information gathered by the administrative agency if its release would unduly interfere with law enforcement. *Id.* at 59 [*citing* Attorney General Opinion MW-575 (1982) at 1-2; Open Records Decision No. 493 (1988) at 2]. (Attachment #12). The best judge of whether the release of information would unduly interfere with law enforcement is ordinarily the agency in possession of it. *See* Open Records Decision No. 287 (1981) at 1. (Attachment #13). However, the agency cannot arbitrarily relegate information to that category. *Id.* (Attachment #13). When the law enforcement exception is claimed as





investigating, examining, and evaluating the adequacy and effectiveness of the Agency's internal control systems. As such, Management Audit is the division of the TRC (an administrative agency) responsible for conducting investigations and reporting violation of law to the appropriate law enforcement agency. It is, in fact, their investigative reports, information identifying and describing witnesses, summaries of confessions, views regarding the guilt of a suspect or the credibility of witnesses, statements made by informants, records of property confiscated at the scene of a crime, laboratory and test results and other documentary evidence that should be excepted from public disclosure. Investigative reports that otherwise qualify for the § 552.108 exception, such as the documentary evidence in a police file (similar to the type of documentary evidence mentioned above) do not necessarily lose that status while in the custody of an agency not directly involved with law enforcement. Open Records Decision No. 272 (1981) at 1-2. (Attachment #14).

### CONCERNS OF THE COMMISSION

The major concern of the Commission is that Open Records requests for investigative reports maintained by Management Audit would allow the public to obtain access to reports which reveal investigative techniques (currently unknown and unavailable to the public) and preliminary investigatory information that when prematurely released would circumvent the purpose of the internal audit function and compromise the integrity of future investigations by cuing wrongdoers to the fact that they are the subject of an investigation. It goes without mention that in releasing such reports the unfortunate result is the chilling effect it would have on potential informant's while impeding the investigatory process and law enforcement.

The Commission submits the following questions of law and requests your official opinion on these matters of official interest:

- (1) Would the members of our Management Audit Division qualify as "administrative officials having a duty of inspection ... within their respective spheres" who would be able to utilize the informer's privilege aspect of §552.101 with respect to reports created in the course of an investigation? [i.e., Would the informer's privilege aspect of §552.101 apply to except the identities of informants (and possibly the informant's statements if those statements reveal the informant's identity) from public disclosure?]
- (2) If our Management Audit Division conducts an investigation and such an investigation reveals possible criminal conduct that the Division *intends* to report (or already has reported), may the Management Audit Division use the §552.108 law enforcement exception to except the information gathered by the agency during the investigations from public disclosure?
  - (a) If so, how must Management Audit manifest such an "intention" to report such criminal conduct?





a basis for excluding information from public view, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how and why release of it would unduly interfere with law enforcement. *Id.* (Attachment #13).

As a general rule, §552.108 excepts from required public disclosure all evidentiary information related to cases under active investigation (except certain basic information ordinarily appearing on the first page of an offense report and in other records of law enforcement agencies relating to arrests) including:

- information identifying and describing witnesses;
- the summary of a confession;
- an investigator's views regarding the guilt of a suspect or the credibility of witnesses;
- statements made by informants;
- the records of property confiscated at the scene of a crime; and
- laboratory and test results.

Texas Open Records Handbook, Section H, subsection 2, at 59. (Attachment #12).

### **LAW ENFORCEMENT AND MANAGEMENT AUDIT**

The Texas Rehabilitation Commission is not considered by the Office of the Attorney General to be a law enforcement agency. Nor is TRC an administrative agency whose chief function is essentially regulatory in nature. However, through its Management Audit Division, TRC has an investigatory function to detect possible criminal conduct within the agency (i.e., fraud, misuse of state property, etc.). If criminal conduct is discovered, it is the duty of the Management Audit Division to report such conduct to the appropriate law enforcement authorities and to act as a liaison with those authorities. If an investigation by an administrative agency (such as TRC) reveals possible criminal conduct that the agency intends to report or already has reported to the appropriate law enforcement agency, then §552.108 will apply to information gathered by the agency if its release would unduly interfere with law enforcement. Texas Open Records Handbook, Part 2, Section H, subsection 1, at 59 [citing Attorney General Opinion MW-575 (1982) at 1-2; Open Records Decision No. 493 (1988) at 2]. (Attachment #12).

The Management Audit function of TRC is an independent appraisal activity established within the Commission to conduct reviews of operation and procedures and to report findings and recommendation to the TRC Board, TRC management, and eventually, to external auditors such as the State Auditor's Office and law enforcement. Management Audit acts as the official liaison between TRC and these external auditors. Management Audit is the only division of TRC charged with the duty of inspecting,





- (b) What if the conduct involved relates to civil penalties? Would the law enforcement exception operate to except the information collected during an investigation by Management Audit relating to this type of conduct?
- (c) If our Management Audit Division were able to utilize the §552.108 law enforcement exception, would such Division also have the benefit of withholding investigative reports, information identifying and describing witnesses, summaries of confessions, investigators' views regarding the guilt of a suspect or the credibility of a witness, statements made by informants, the records of property confiscated at the scene of a crime, an laboratory and test results as evidentiary information in the same manner as other law enforcement agencies or would the agency only be able to withhold such information upon a showing that release of such information would unduly interfere with law enforcement? *See Texas Open Records Act Handbook, Part 2, Section H, subsection 2, at 59. (Attachment #12).*
- (d) If TRC is only able to withhold such information upon showing that the release of such information would unduly interfere with law enforcement, must TRC make a request for an Open Records Opinion each time the Division seeks to withhold such information if, in our opinion, the disclosure of such information would unduly interfere with law enforcement?
- (3) Regardless of whether our Management Audit Division has the benefit of the law enforcement exception, would the result be different if it were the Office of the General Counsel of TRC who gathered and possessed the information? [i.e., Would the law enforcement exception apply or would another exception apply, such as the §552.103(a) litigation exception, so that the information could be considered attorney work product?] **(Attachment #15).**

The Commission respectfully requests an opinion on these matters. Thank you for your assistance.

Sincerely,

  
Vernon M. Arrell  
Commissioner

VMA/LKP

cc: Sarah Shirley, Chief of the Opinion Committee

