



November 21, 2000

Mr. Roland Castañeda
General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2000-4465

Dear Mr. Castañeda:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 141456.

Dallas Area Rapid Transit ("DART") received a request for a variety of information related to the investigation of a complaint against a DART employee. You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney; it does not apply to all client information held by a governmental body's attorney. *See* Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* Section 552.107(1) does not except purely factual information from disclosure. *Id.* at 4.

The documents you seek to withhold are identified as Attachments B and C. You inform us that both attachments "were created at the direction of legal counsel" and involved "legal review, drafting, and editing." However, Attachment B is not the statement of an attorney. It consists of a recounting of events and an analysis and conclusion that are essentially factual. The fact that Attachment B was sent through the legal department for review and

editing does not alter the character of the document. Attachment B does not consist of legal advice or client confidences. It may not be withheld pursuant to section 552.107(1). Similarly, Attachment C consists of a copy of Attachment B, handwritten and typed notes of witness interviews, form letters, and memoranda that do not reveal client confidences or an attorney's legal advice. None of the submitted information may be withheld under section 552.107(1).

You also claim that the information at issue is excepted from disclosure as "attorney work product" under section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). As you have not informed us of any objective steps taken toward the institution of litigation by any party, we find that you have not demonstrated that there is a substantial chance that litigation will ensue. Furthermore, you have not met the second part of the attorney work product test because the submitted information does not reveal an attorney's mental processes, conclusions, or legal theories. Consequently, DART may not withhold any of the records at issue under section 552.111 as "attorney work product."

Finally, we address your section 552.101 claims. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." We understand you to be raising issues of common law and constitutional privacy, which are encompassed by section 552.101. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication 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, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate or 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.

In addition, this office has also held that information may be withheld from public disclosure in certain special circumstances under section 552.101 in conjunction with common law

privacy. *See* Open Records Decision No. 169 (1977). An imminent threat of physical danger, as opposed to a generalized and speculative fear of harassment or retribution, is one such “special circumstance.” *Id.* at 6. 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. We have reviewed the submitted information and conclude that no imminent threat of physical danger has been demonstrated. Therefore, we have marked the limited information we find to be excepted by common law privacy under section 552.101.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See* Open Records Decision No. 455 at 3-7 (1987); *see also* *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981). The second constitutionally protected interest is in freedom from public disclosure of certain personal matters. *See* Open Records Decision No. 455 at 6-7 (1987); *see also* *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985), *reh’g denied*, 770 F.2d 1081 (1985), *cert. denied*, 474 U.S. 1062 (1986). Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” Open Records Decision No. 455 at 8 (1987), *quoting* *Ramie v. City of Hedwig Village*, 765 F.2d at 492. Upon careful review of the information in question, we conclude that none of it is confidential under section 552.101 in conjunction with a constitutional right to privacy.

In summary, DART must withhold the information we have marked as excepted under section 552.101 in conjunction with common law privacy but must release all of the remaining requested 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 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 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,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/seg

Ref: ID#141456

Encl. Submitted documents

cc: Mr. Orrie Holmen
4128 Wimbledon Drive
Flower Mound, Texas 75028
(w/o enclosures)