



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 22, 2008

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

OR2008-00944

Dear Mr. Simmons:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 301444.

The Dallas Area Rapid Transit ("DART") received a request for the personnel file of a named DART operator. You state that some of the requested information will be released, but claim that the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You assert the submitted information is confidential under subsections 405.004(e) and (f) of the Labor Code. Chapter 405 of the Labor Code pertains to the workers' compensation research and evaluation group (the "group"), which conducts professional studies and research on issues related to workers' compensation on behalf of the Texas Department of Insurance Division of Workers' Compensation.<sup>1</sup> See Labor Code §§ 405.001 (for purposes of chapter 405,

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<sup>1</sup>Effective September 1, 2005, the legislature abolished the Texas Workers' Compensation Commission and established the Division of Workers' Compensation as a division within the Texas Department of Insurance to administer and operate the workers' compensation system. See Labor Code § 402.001.

“group” is defined as the workers’ compensation research and evaluation group), 405.0025 (listing group’s research duties). Section 405.004 provides in relevant part the following:

(e) A working paper, including all documentary or other information, prepared or maintained by the group in performing the group’s duties under this chapter or other law to conduct an evaluation and prepare a report is excepted from the public disclosure requirements of Section 552.021, Government Code.

(f) A record held by another entity that is considered to be confidential by law and that the group receives in connection with the performance of the group’s functions under this chapter or another law remains confidential and is excepted from the public disclosure requirements of Section 552.021, Government Code.

*Id.* § 405.004(e), (f). You state that the submitted information “contains workers’ compensation medical records, drug testing records and physician records that were obtained and maintained by DART’s Human Resource Department.” However, you do not inform us that the submitted information is a working paper prepared or maintained by the group in performing the group’s duties under chapter 405 or other law to conduct an evaluation and prepare a report. *See id.* § 405.004(e). You also do not inform us, and you have not otherwise established, that the submitted information was received by the group in connection with the performance of the group’s functions under chapter 405 or another law. *See id.* § 405.004(f). Therefore, we find you have failed to establish that the submitted information is confidential under section 405.004, and DART may not withhold the information under section 552.101 on that ground.

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Medical records must be released upon the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information

is to be released. *Id.* §§ 159.004, 159.005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked portions of the submitted information that constitute medical records and that may only be released in accordance with the MPA. The remaining information does not consist of medical records for purposes of the MPA, and it may not be withheld on that ground.

Section 552.101 also encompasses chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) states that “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *Id.* § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* ORD 565. We have marked the information that constitutes mental health records, and that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

Section 552.101 also encompasses section 258.102 of the Occupations Code. Section 258.102(a) provides as follows:

The following information is privileged and may not be disclosed except as provided by this subchapter:

- (1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and
- (2) a dental record.

Occupation Code § 258.102(a). A “dental record” means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *Id.* § 258.101(1). Section 258.104 provides for the disclosure of privileged dental records by the patient. *See id.* § 258.104(a). We have marked the dental records that may only be released in accordance with chapter 258 of the Occupations Code. *See id.* §§ 258.104-258.107.

Section 552.101 also encompasses the Family and Medical Leave Act (the “FMLA”), section 2654 of title 29 of the United States Code. Section 825.500 of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are

subject to the FMLA. Subsection (g) of section 825.500 provides in relevant part the following:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[.]

29 C.F.R. § 825.500(g). Some of the submitted documents are confidential under section 825.500 and none of the release provisions of the FMLA applies to these documents. Thus, DART must withhold the documents we have marked pursuant to section 552.101 in conjunction with the FMLA.

You assert that the remaining information is excepted under section 552.102 of the Government Code. Section 552.102(a) of the Government Code excepts from required public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exception applies when the release of information would result in a violation of the common-law right to privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). The common-law right to privacy protects information that (1) contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) is of no legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types 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. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). But this office has found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). We have marked the information that is confidential under common-law privacy and that DART must withhold under section 552.102. But the remaining information is either not highly intimate or embarrassing, or it is of legitimate public interest; therefore,

the remaining information is not confidential under common-law privacy, and DART may not withhold it on that ground.

We note that section 552.117 of the Government Code may be applicable to some of the remaining information. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), DART must withhold this personal information that pertains to a current or former employee of DART who elected, prior to DART's receipt of the request for information, to keep such information confidential. Such information may not be withheld for individuals who did not make a timely election. We have marked information that must be withheld if section 552.117 applies.

We note that some of the remaining information is excepted under section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). DART must withhold the Texas motor vehicle record information we have marked under section 552.130.

To conclude, the marked medical records may only be released in accordance with the MPA, the marked mental health records may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code, and the marked dental records may only be released in accordance with chapter 258 of the Occupations Code. DART must withhold the following: the information marked under section 552.101 of the Government Code in conjunction with the FMLA; the information marked under section 552.102 of the Government Code in conjunction with common-law privacy; the information marked under section 552.117 if the employee timely elected to withhold that information; and the information marked under section 552.130 of the Government Code. DART must release the remaining information.<sup>2</sup>

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

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<sup>2</sup>We note that the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

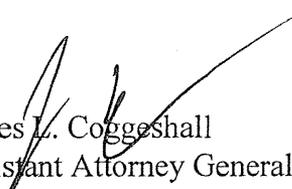
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/jh

Ref: ID# 301444

Enc. Submitted documents

c: Ms. Tangangika Shirley  
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(w/o enclosures)