



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 29, 2009

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

OR2009-05708

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# 341334.

Dallas Area Rapid Transit ("DART") received a request for the application and resume of two named individuals. You claim that the requested information is excepted from disclosure under sections 552.102, 552.103, 552.117, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You claim that Exhibit B is excepted under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

This office has stated that a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). You have submitted information which establishes that, prior to DART's receipt of the request for information, one of the employees at issue filed a discrimination complaint with the EEOC against DART. Based on your representations and our review of the submitted documents, we find you have demonstrated that litigation was reasonably anticipated when DART received the request for information. Our review of the information at issue also shows that it is related to the anticipated litigation for purposes of section 552.103(a). Thus, section 552.103 is generally applicable to Exhibit B.

We note, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the potential opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. In this instance, the opposing party has already seen the employment application at issue. Therefore, none of the information in Exhibit B may be withheld under section 552.103.

You claim that Exhibit E is subject to section 552.102 of the Government Code. Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas*

Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101.

For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure 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. 540 S.W.2d at 685. The type 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. Additionally, a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (when considering prong regarding individual's privacy interest, the court recognized distinction between public records found in courthouse files and local police station and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history).

You argue that common-law privacy protects information relating to criminal conduct on the submitted employment applications. However, the information at issue was supplied by the applicant herself in response to questions posed on the employment application. Thus, this information is not criminal history information compiled by DART. Accordingly, no portion of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy on this basis. Furthermore, we find that, although the information at issue may be potentially embarrassing, it is of legitimate public interest and, therefore, may not be withheld under section 552.101 and common-law privacy on this basis either. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 (1984) (scope of public employee privacy is narrow), 405 (1983) (manner in which employee performed job cannot be said to be of minimal public interest), 400 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy).

Section 552.117(a)(1) of the Government Code excepts from disclosure the 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 this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024. We note section 552.117 also encompasses a personal cellular

telephone number, unless the cellular service is paid for by a governmental body. *See* Open Records Decision Nos. 670 at 6 (2001), 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). In this case, you only provide us with documentation showing that one of the employees whose information is at issue timely elected confidentiality under section 552.024. As to the remaining employee whose information is at issue in Exhibit B, you do not inform us nor provide documentation showing that this person timely elected confidentiality under section 552.024. Thus, for the employee who timely elected to keep her personal information confidential, you must withhold her information, which we have marked in Exhibit E, under section 552.117(a)(1) of the Government Code. DART may only withhold the information we have marked in Exhibit B under section 552.117(a)(1) if this employee also timely elected to keep her personal information confidential.

You also claim that portions of Exhibit E are excepted under section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. In accordance with section 552.130 of the Government Code, DART must withhold the Texas motor vehicle record information we have marked.

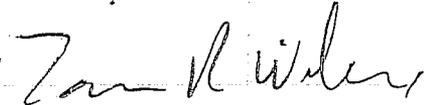
Finally, you claim that some of the remaining information in Exhibit E is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that the individual at issue has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, DART must withhold the private e-mail address we have marked under section 552.137.

In summary, DART must withhold the information we have marked for the employee who timely elected to keep her personal information confidential under section 552.117(a)(1) of the Government Code. DART may only withhold the information we have marked in Exhibit B under section 552.117(a)(1) if this employee also timely elected to keep her personal information confidential. DART must withhold the information we have marked in Exhibit E under sections 552.130 and 552.137 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 341334

Enc. Submitted documents

c: Requestor
(w/o enclosures)