



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 28, 2010

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

OR2010-01373

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# 368550 (DART ORR No. 6968).

Dallas Area Rapid Transit ("DART") received a request for information relating to a specified job posting, including self-nomination forms, resumes, candidate selection summaries, and acceptance offers. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.122, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

We first note that the submitted information includes job postings that are subject to disclosure under section 552.022 of the Government Code. Section 552.022(a)(15) provides for required public disclosure of "information regarded as open to the public under an agency's policies[,] unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(15). Because DART makes job postings available on its website, we find that the submitted job postings are regarded as open to the public under DART's policies and are therefore subject to section 552.022(a)(15). Although you claim an exception to disclosure under section 552.122 of the Government Code, that section is a discretionary exception that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.122 is not other law that makes information confidential for the purposes

of section 552.022(a)(15). Thus, the submitted job postings may not be withheld under section 552.122. You also claim exceptions under sections 552.101 and 552.137, which are confidentiality provisions for the purposes of section 552.022(a)(15). However, none of the information in the submitted job postings falls within the scope of either of those exceptions. Therefore, DART must release the job postings we have marked pursuant to section 552.022(a)(15).

Next, we address your exceptions to disclosure of the remaining information. We begin with your claims under section 552.122, as that section is the most inclusive exception you raise. Section 552.122(a) excepts from disclosure “[a] test item developed by an educational institution that is funded wholly or in part by state revenue[.]” Gov’t Code § 552.122(a). Section 552.122(b) excepts from disclosure “[a] test item developed by a . . . governmental body[.]” *Id.* § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated,” but does not encompass evaluations of an employee’s overall job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

You seek to withhold interview questions and answers, candidate selection summaries, and selection interview summary forms under section 552.122. You contend that the release of this information would be detrimental to future interviews of candidates for the same positions and would reduce the effectiveness of the selection process. Because you acknowledge that DART is a governmental unit operating a regional public transit system, and not “an educational institution . . . funded wholly or in part by state revenue,” we find that section 552.122(a) is not applicable to any of the information at issue. We also find that you have not sufficiently demonstrated that any of the information at issue qualifies as a “test item” for the purposes of section 552.122(b). We therefore conclude that DART may not withhold any of the submitted information under section 552.122 of the Government Code.

Turning to the other exceptions you raise, section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in

workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We have marked medical information that is intimate or embarrassing and not a matter of legitimate public interest. DART must withhold that information under section 552.101 in conjunction with common-law privacy.

Common-law privacy also encompasses certain types of personal financial information. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). We have marked personal financial information that also is intimate or embarrassing and not a matter of legitimate public interest. DART also must withhold that information under section 552.101 in conjunction with common-law privacy.

Section 552.137 provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). Gov't Code § 552.137(a)-(c). We note that section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. DART must withhold the personal e-mail addresses we have marked under section 552.137, unless the owner of an e-mail address has affirmatively consented to its disclosure.¹

¹We note that this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision.

Lastly, we note that DART may be required to withhold some of the remaining information at issue under section 552.117 of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See id.* §§ 552.117, .024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. We have marked information relating to current or former DART employees that must be withheld under section 552.117(a)(1) to the extent that the employees concerned timely requested confidentiality for the marked information under section 552.024. We note that a post office box number is not a "home address" for the purposes of section 552.117.³ We also note that, because this exception protects personal privacy, DART may not withhold information that relates to the requestor under section 552.117(a)(1).

In summary: (1) DART must release the marked job postings pursuant to section 552.022(a)(15) of the Government Code; (2) DART must withhold the marked medical and personal financial information under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the marked e-mail addresses must be withheld under section 552.137 of the Government Code, unless the owner of an e-mail address has affirmatively consented to its disclosure; and (4) the marked information that relates to current or former DART employees must be withheld under section 552.117(a)(1) of the Government Code to the extent that the employees concerned timely requested confidentiality for the marked information under section 552.024 of the Government Code. The rest of the submitted information must be released.

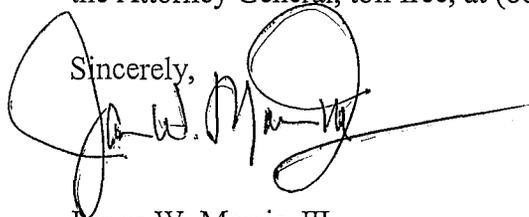
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

²Unlike other exceptions to disclosure under the Act, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

³*See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov't Code § 552.117 is to protect public employees from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)) (emphasis added).

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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III", with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 368550

Enc: Submitted documents

c: Requestor
(w/o enclosures)