



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 9, 2010

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

OR2010-03414

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# 372043 (DART ORR# 7055).

The Dallas Area Rapid Transit ("DART") received a request for e-mails and other information relating to the employment of, arrests by, and termination of a named officer, specified disciplinary actions, documents relating to report number DCT09001766, and records pertaining to the training of three named officers. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we must address DART's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e-1) provides the following:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body not later than the 15th business day after the date of receiving the written request. If the written comments disclose or contain the substance of the information

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

requested, the copy of the comments provided to the person must be a redacted copy.

See Gov't Code § 552.301(e-1). We note you have provided our office with a copy of the written comments you provided to the requestor pursuant to section 552.301(e)(1)(A). Upon review, we note DART redacted its discussion of the claimed exceptions from the copy, including information that does not disclose or contain the substance of the information requested. Thus, we conclude DART failed to comply with the procedural requirements of section 552.301(e-1) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision Nos. 319 (1982), 586 (1991), 630 (1994). This office has held a compelling reason exists to withhold information when third party interests are at stake or when information is made confidential by another source of law. *See* Open Records Decision No. 150 (1977) (construing predecessor statute). Although DART claims exceptions to disclosure under sections 552.103, 552.108, and 552.122 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 177 (1977) (governmental body may waive statutory predecessor to section 552.108), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Because DART failed to comply with the procedural requirements of the Act, DART has waived its claims under sections 552.103, 552.108, and 552.122. However, the need of a governmental body, other than the agency that is seeking an open records decision, to withhold information under sections 552.103 and 552.108 of the Government Code can provide compelling reasons to withhold information from disclosure. *See* Open Records Decision No. 586 at 3 (1991); Open Records Decision Nos. 469 (1987) (university may withhold information under Gov't Code § 552.103 predecessor to protect district attorney's interest in anticipated criminal litigation). Because you inform us, and we have received a statement showing, the Dallas County District Attorney's Office (the "district attorney") objects to the release of a portion of the information at issue under sections 552.103 and 552.108 of the Government Code, we will consider whether DART may withhold that information under sections 552.103 and 552.108 on behalf of the district attorney. You also raise section 552.101 of the Government Code for portions of the submitted information. Further, we note the submitted information

contains information that is subject to sections 552.117, 552.130, and 552.137 of the Government Code.² Because sections 552.101, 552.117, 552.130, and 552.137 can provide compelling reasons to overcome the presumption in section 552.302, we will also address their applicability to the submitted information.

Section 552.108 (a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [if] release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108 (a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You inform us, and we have received a statement from the district attorney showing, the district attorney has an ongoing criminal investigation pertaining to police report number DC08005796. Further, the district attorney objects to the release of police report number DC08005796 under section 552.108 because its release would interfere with its investigation or prosecution of a crime. Based on these representations, we conclude the release of police report number DC08005796 would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Thus, section 552.108(a)(1) is applicable to police report number DC08005796.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, DART may withhold police report number DC08005796 from disclosure under section 552.108(a)(1) on behalf of the district attorney.³

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the common-law right of privacy. Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³As our ruling is dispositive, we need not address the district attorney’s remaining argument against disclosure, except to note basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991).

publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by common-law privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Furthermore, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). The doctrine of common-law privacy also protects a compilation of an individual's criminal history, which 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, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Generally, however, the public has a legitimate interest in information that relates to public employment and public employees. See Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow); cf. Open Records Decision No. 484 (1987) (public's interest in knowing how police departments resolve complaints against police officer ordinarily outweighs officer's privacy interest). Upon review, we find portions of the remaining information, which we have marked, are highly intimate or embarrassing and not of legitimate concern to the public. Accordingly, DART must withhold the marked information under section 552.101 in conjunction with common-law privacy. However, you have failed to demonstrate how any portion of the remaining information is highly intimate or embarrassing or the information is of legitimate public interest. Accordingly, no portion of the remaining information at issue may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2). We note section 552.117 is also

applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. However, we note that section 552.117 protects personal privacy. In this instance, the requestor is the authorized representative of an officer whose personal information is also at issue. Therefore, the requestor has a right of access to her client's private information under section 552.023 of the Government Code.⁴ *See* Gov't Code § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or his authorized representative requests information concerning the individual). Accordingly, DART must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code; however, any cellular telephone numbers may only be withheld if the licensed peace officer pays for the service with his or her own funds.

Section 552.130 of the Government Code provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Id. § 552.130(a)(1), (2). Upon review, we find the information we have marked consists of Texas motor vehicle record information. Accordingly, DART must withhold the marked Texas motor vehicle record information under section 552.130 of the Government Code.

The submitted information contains e-mail addresses that may be subject to section 552.137 of the Government Code, which 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 id.* § 552.137(a)-(c). Accordingly, DART must withhold the e-mail addresses we have marked under section 552.137, unless the owners of the e-mail addresses have affirmatively consented to their release. *See id.* § 552.137(b).

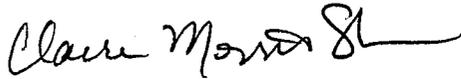
⁴Section 552.023 provides in part that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a).

In summary, with the exception of the basic information, DART may withhold police report number DC08005796 from disclosure under section 552.108(a)(1) on behalf of the district attorney. DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. DART must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, any cellular telephone numbers may only be withheld under section 552.117(a)(2) if the licensed peace officer pays for the service with his or her own funds. DART must withhold the information we have marked under section 552.130 of the Government Code, and the e-mail addresses we have marked under section 552.137, unless the owners of the e-mail addresses have affirmatively consented to their release.⁵ The remaining information must be released.⁶

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, toll free at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/jb

⁵We note 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 Texas driver's license numbers and Texas license plate numbers under section 552.130 of the Government Code and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

⁶We note the information being released 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. *See* Gov't Code § 552.147(b).

Ref: ID# 372043

Enc. Submitted documents

c: Requestor
(w/o enclosures)