



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 6, 2010

Ms. Shirley Thomas
Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2010-09903

Dear Ms. Thomas:

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# 385457 (DART ORR # 7378).

Dallas Area Rapid Transit ("DART") received a request for any and all internal affairs or administrative investigations performed by DART, all performance evaluations, all commendations or awards, all documents regarding disciplinary actions, and all training records for the requestor's client, as well as all disciplinary records for DART police department employees regarding violations of sections 1.5(23)(C) and (H) of the DART police department's Code of Conduct for the last five years. You state that you do not have information responsive to the second half of the request.¹ You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.122 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." Gov't Code § 552.101. This section encompasses the doctrines of constitutional and common-law

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

privacy. Constitutional privacy encompasses two types of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

Federal courts have recognized that individuals have a constitutional right to privacy in their unclothed bodies. Quoting the United States Court of Appeals for the Ninth Circuit, which concluded that "[w]e cannot conceive of a more basic subject of privacy than the naked body[,]" the United States Court of Appeals for the Second Circuit has found that "there is a right to privacy in one's unclothed or partially unclothed body, regardless [of] whether that right is established through the auspices of the Fourth Amendment or the Fourteenth Amendment." *Poe v. Leonard*, 282 F.3d 123, 138-39 (2d Cir. 2002) (quoting *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963)). Some of the submitted photographs depict the naked bodies of identifiable individuals. We find that these individuals have a constitutional right to the privacy of this information that outweighs any public interest in its release. We, therefore, conclude that DART must generally withhold the photographs of naked bodies, which we have marked, under section 552.101 in conjunction with constitutional privacy. However, the requestor's client may be one of the individuals in the photographs. Section 552.023 of the Government Code provides 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." *See* Gov't Code § 552.023(a); *see also id.* § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on the grounds that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or individual's authorized representative requests information concerning the individual). Accordingly, this requestor would have a right of access to information pertaining to her client that would ordinarily be confidential under section 552.101 in conjunction with constitutional privacy. Therefore, if the requestor's client is one of the individuals in the photographs, then the submitted photographs pertaining solely to the requestor's client may not be withheld from her under section 552.101 in conjunction with constitutional privacy. However, if the requestor's client is not one of the individuals depicted, then the submitted photographs depicting naked bodies must be withheld in their entirety pursuant to section 552.101 in conjunction with constitutional privacy.

Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the 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). 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. However, this office has stated, in numerous decisions, that information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *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 performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). You argue that the remaining photographs are confidential under common-law privacy. Upon review, we find you have failed to demonstrate how any of the remaining photographs are highly intimate or embarrassing and not of legitimate public interest. Accordingly, none of the remaining information is confidential under the doctrine of common-law privacy, and it may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.122(a) of the Government Code exempts 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) of the Government Code exempts from disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 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. ORD 626 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 raise section 552.122 of the Government Code for a portion of the submitted information. You argue that release of these test questions and answers would be detrimental because it would provide an unfair advantage to individuals to whom the information is released. Additionally, you argues that release of the examination questions and answers would impair DART's ability to evaluate qualified police officers. You state DART uses the same or similar examination questions every two years that the examinations are

administered. 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. Having considered your arguments and reviewed the submitted information, we find that the information we have marked qualifies as test items for the purposes of section 552.122(b). We also find that release of the answers to these questions, which we have also marked, would tend to reveal the questions themselves. Therefore, DART may withhold the information we have marked under section 552.122(b) of the Government Code. You have failed to explain, however, how the remaining submitted information constitutes a test item for purposes of section 552.122. Accordingly, we determine the remaining submitted information does not consist of test items under section 552.122(b) and may not be withheld on that basis.

In summary, the submitted photographs depicting naked bodies, which we have marked, must be withheld pursuant to section 552.101 in conjunction with constitutional privacy. If the requestor's client is one of the individuals in the photographs, then she will have a special right of access to the submitted photographs that pertain solely to her client pursuant to section 552.023 of the Government Code. DART may withhold the information we have marked under section 552.122 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, toll free at (888) 672-6787.

Sincerely,



Lauren J. Holmsley
Assistant Attorney General
Open Records Division

LJH/eeg

Ref: ID# 385457

Enc. Submitted documents

c: Requestor
(w/o enclosures)