ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2010

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

OR2010-12883

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# 391461 (DART ORR# 7480).

Dallas Area Rapid Transit ("DART") received a request for background investigation records pertaining to the requestor. You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.[1]

Initially, we note that the submitted information includes the test results of individuals' blood alcohol contents. Section 724.018 of the Transportation Code provides that upon the request of the person who has given a specimen at the request of a peace officer, full information concerning the analysis of the specimen must be made available to that person or the person's attorney. Transp. Code § 724.018. As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). In this instance, the requestor is one

[1]We 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 that those records contain substantially different types of information than that submitted to this office.

of the individuals whose breath specimen analysis is at issue. Therefore, the requestor's breath test results must be released to him pursuant to section 724.018 of the Transportation Code.

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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (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 types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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 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) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); *but see* Open Records Decision No. 478 at 4 (1987) ("it is of legitimate public interest that a driver on public roads may have been driving while under the influence of alcohol or other intoxicants"). This office has also 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), 545 (1990). 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. U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, this office has stated that there is a legitimate public interest in the qualifications of persons who seek public employment, as well as the hiring practices of governmental entities. *See generally* Open Records Decisions Nos. 542 at 5 (1990) (information regarding the qualifications of a public employee is of legitimate concern to the public), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 455 at 9 (1987) (public has a legitimate interest in knowing applicants' past employment record and their suitability for the employment position in question). We also note an individual's name, home address, and telephone number are generally not private information under common-law privacy. *See* Open Records Decision No. 554 at 3 (1990) (disclosure of person's name, address, or telephone number not an invasion of privacy). Upon review, we find the information we have marked in is highly intimate or embarrassing and not of legitimate public concern. Therefore, DART must withhold the information we have marked under section 552.101 of

the Government Code pursuant to common-law privacy. However, the remaining submitted information is not intimate or embarrassing or is of legitimate public interest. Thus, DART may not withhold any of the remaining information under common-law privacy.

DART also seeks to withhold some of the remaining information under section 552.101 in conjunction with common-law privacy and "special circumstances." The Third Court of Appeals recently ruled, however, that the "special circumstances" exception found in past Attorney General Open Records Decisions directly conflicts with Texas Supreme Court precedent regarding common-law privacy. *See Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. and Hearst Newspapers, L.L.C.*, 287 S.W.3d 390 (Tex. App.—Austin 2009, pet. filed). The court of appeals ruled that the two-part test set out in *Industrial Foundation* is the "sole criteria" for determining whether information can be withheld under common-law privacy. *Id.* at 394; *see also Indus. Found.*, 540 S.W.2d at 686. Upon review, we find that the remaining information for which you assert "special circumstances" is not intimate or embarrassing. As you have failed to meet the first prong of the *Industrial Foundation* test for privacy, we find that the remaining information for which you assert "special circumstances" is not confidential under common-law privacy, and DART may not withhold this information on that basis.

Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides that a governmental body may not release fingerprint information except in certain limited circumstances. Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). In this instance, it does not appear section 560.002 permits the disclosure of the fingerprints at issue. Therefore, DART must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

We note some of the remaining submitted information is subject to section 552.130 of the Government Code.[2] 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." *Id.* § 552.130. Thus,

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

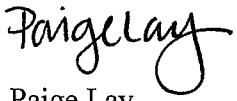
DART must withhold the information we have marked under section 552.130 of the Government Code.[3]

In summary, the requestor's breath test results must be released to him pursuant to section 724.018 of the Transportation Code. DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and section 560.003 of the Government Code. DART must also withhold the information marked under section 552.130 of the Government Code. The remaining information must be released.[4]

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

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[3]We 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 and license plate numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

[4]We note that 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 under the Act. Gov't Code § 552.147 (b). We also note that the information being released contains confidential information to which the requestor has a right of access. *See id.* § 552.023(a). Therefore, if DART receives another request for this particular information from a different requestor, then DART must again seek a decision from this office.

Ref: ID# 391461

Enc. Submitted documents

cc: Requestor
(w/o enclosures)