



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 5, 2010

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

OR2010-16815

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# 399299 (DART ORR# 7644).

Dallas Area Rapid Transit ("DART") received a request for all records, including employment and disciplinary records, regarding a named former employee. You claim the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.111 of the Government Code.¹ We have considered your arguments and reviewed the submitted representative sample of information.²

¹Although you also raise the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure, we note, in this instance, section 552.111 of the Government Code is the proper exception to claim for the substance of your argument.

²We 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.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency,” and encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied: (a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue; and (b) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation. *See Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

You claim the handwritten notes submitted as Attachment C are protected by the attorney work product privilege. You state, and provide documentation showing, DART was a party to litigation involving the named former employee. You explain the notes were created by a DART attorney during the course of that litigation. Based on your representations and our review, we agree the information in Attachment C was created for trial by a party representative. Accordingly, DART may withhold Attachment C as attorney work product under section 552.111 of the Government Code.

You claim the personnel records submitted as Attachment B are confidential under section 552.101 of the Government Code in conjunction with the doctrine of common-law privacy and under section 552.102 of the Government Code. 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. Section 552.101 encompasses the doctrine

of common-law privacy. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" *Id.* § 552.102(a). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). We will, therefore, consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102.

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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. 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. 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). You seek to withhold the personnel records in Attachment B in their entirety. We note the majority of the personnel records pertain to employee performance evaluations, as well as complaints and investigations of alleged employee misconduct. Although some of this information may be considered highly intimate or embarrassing, we find there is a legitimate public interest in information related to the job performance of the individual involved. Therefore, Attachment B may not be withheld in its entirety under section 552.101 of the Government Code in conjunction with common-law privacy or under section 552.102(a) of the Government Code.

We note, however, Attachment B includes medical information pertaining to a private citizen, as well as personal financial information regarding the employee's optional insurance coverages and paycheck withholdings. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Furthermore, this office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *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). We have marked the medical and financial information at issue, and find this information is not of legitimate public concern. Therefore, DART must withhold the marked information under common-law privacy.

Section 552.101 also encompasses section 1701.454 of the Occupations Code, which governs the release of reports or statements submitted to the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE"). Section 1701.454 provides:

(a) A report or statement submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under [the Act], unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter.

Occ. Code § 1701.454. You assert the F-5 form included in Attachment B is confidential under section 1701.454. The form, however, indicates the officer was terminated for, among other things, a substantiated incident of excessive force. Therefore, the F-5 form in Attachment B may not be withheld under section 552.101 of the Government Code in conjunction with 1701.454 of the Occupations Code.

The remaining information in Attachment B includes a Texas driver's license expiration date. Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license issued by a Texas agency is excepted from public release.³ Gov't Code § 552.130(a)(1). We have marked the driver's license expiration date in the remaining information. The department must withhold the marked information under section 552.130 of the Government Code.

In summary, DART may withhold Attachment C under section 552.111 of the Government Code. DART must withhold in Attachment B the marked medical and financial information

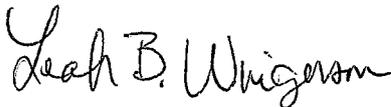
³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

under common-law privacy, and the marked Texas driver's license expiration date 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

⁴We note the information to be released includes 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.

The information to be released also contains information that is generally excepted from disclosure under sections 552.101 in conjunction with section 6103(a) of title 26 of the United States Code, 552.117, 552.1175, 552.130, and 552.136 of the Government Code. You state you will withhold the information authorized to be withheld pursuant to the previous determination issued in Open Records Decision No. 684 (2009). *See* ORD 684 (authorizing all governmental bodies to withhold ten categories of information, including certain information under sections 552.101, 552.130, and 552.136, without necessity of requesting attorney general decision). You also state you will withhold the information subject to sections 552.117 and 552.1175. *See* Gov't Code §§ 552.1175(f) (authorizing all governmental bodies to withhold information subject to section 552.1175 without necessity of requesting attorney general decision), .024 (authorizing all governmental bodies to withhold information subject to section 552.117 without necessity of requesting attorney general decision, if employee or official chooses to not allow public access to information); Open Records Decision No. 670 (2001) (authorizing all governmental bodies to withhold information subject to section 552.117(a)(2) without necessity of requesting attorney general decision).

Ref: ID# 399299

Enc. Submitted documents

c: Requestor
(w/o enclosures)