



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 8, 2011

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

OR2011-01907

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# 408415 (DART ORR# 7842).

Dallas Area Rapid Transit ("DART") received a request for complaints filed and disciplinary actions taken against five named officers and complaints of sexual harassment filed against a named sergeant by two named individuals during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, you state the portion of the present request seeking disciplinary actions taken against five named officers was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-01795 (2011). As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, DART must continue to rely on that ruling as a previous determination and withhold or release this information in accordance with Open Records Letter No. 2011-01795. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was

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<sup>1</sup>We assume that the "representative sample" of information 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.

addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note the submitted information contains completed evaluations subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]” unless the information is expressly confidential under “other law” or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). Although you seek to withhold this information under section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas, 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not “other law” that makes information confidential for the purposes of section 552.022. Therefore, DART may not withhold the completed evaluations, which we have marked, under section 552.103. We will, however, address DART’s argument under section 552.103 for the information not subject to section 552.022. Additionally, because information subject to section 552.022 may be withheld under section 552.101 of the Government Code, we will address DART’s argument under this exception for the information subject to section 552.022, as well as the remaining 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 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). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. The type of information considered intimate or 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. You cite to *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), in support of your argument under common-law privacy for the submitted information. In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. Here, however, the information at issue does not relate to an allegation of sexual harassment. Because the

allegation does not concern sexual harassment, we find that *Ellen* is not applicable in this instance. Consequently, DART may not withhold any of the submitted information under section 552.101 in conjunction with common-law privacy on the basis of *Ellen*.

You also raise section 552.101 in conjunction with common-law privacy for some additional information. We find the information you have indicated pertains to an individual who is not identified in the submitted information. Therefore, we find this information does not implicate any individual's privacy interest. Accordingly, this information may not be withheld under common-law privacy. Therefore, DART may not withhold any of the submitted information under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5; see *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). Although you also seek to withhold the submitted information pursuant to constitutional privacy, we find none of the submitted information contains information that is confidential under constitutional privacy. Consequently, DART may not withhold any of the submitted information under section 552.101 on that basis.

Next, we address your argument under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 provides in part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that raises section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture."<sup>2</sup> *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See Open Records Decision No. 555 (1990); see also Open Records Decision No. 518 at 5 (1989)* (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See Open Records Decision No. 331 (1982).*

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<sup>2</sup>Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see Open Records Decision No. 336 (1982)*; (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see Open Records Decision No. 346 (1982)*; and (3) threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981).*

You claim the information not subject section 552.022 is excepted under section 552.103 based on a separate claim of anticipated litigation. You state the information at issue relates to an internal discrimination complaint with DART. Based on that complaint, you contend DART reasonably anticipates litigation. We note, however, that a threat to sue, or a perceived threat to sue, without any further action is not sufficient to establish reasonably anticipated litigation. *See* ORD 331. In this instance, you have not informed us the individual at issue has taken any concrete steps toward the initiation of litigation. *See id.* Consequently, after reviewing your arguments, we find you have not established that DART reasonably anticipated litigation when it received the request for information. Accordingly, DART may not withhold any of the information at issue under section 552.103 of the Government Code.

We note some of the submitted information is subject to section 552.117(a)(2) of the Government Code.<sup>3</sup> Section 552.117(a)(2) excepts from public disclosure the home addresses, home telephone numbers, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.<sup>4</sup> Gov't Code § 552.117(a)(2). Section 552.117(a)(2) is also applicable to a peace officer's cellular telephone number, if the cellular telephone service is paid for by the officer with his or her own funds. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use).

We have marked officers' personal information, which includes an officer's cellular telephone number. You have not informed us whether the officer's marked cellular telephone number is paid for by the officer. Thus, to the extent the marked cellular telephone service is paid for by the named officer, DART must withhold this information, along with the other personal information we have marked, under section 552.117(a)(2) of the Government Code. To the extent the officer did not pay for the cellular telephone service, the cellular telephone number must be released, but the remaining personal information we have marked must be withheld under section 552.117(a)(2) of the Government Code.

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<sup>3</sup>The 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).

<sup>4</sup>"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

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In summary, DART must continue to rely on Open Records Letter No. 2011-01795 as a previous determination and withhold or release this information in accordance with that ruling. DART must withhold the information we have marked under section 552.117(a)(2) of the Government Code. However, the marked cellular telephone number may only be withheld under section 552.117(a)(2) of the Government Code if service is paid for by the officer. 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](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,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/vb

Ref: ID# 408415

Enc. Submitted documents

c: Requestor  
(w/o enclosures)