



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 14, 2011

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

OR2011-02238

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# 409072 (DART PIR #7853).

Dallas Area Rapid Transit ("DART") received a request for (1) evaluation sheets with final scores for individuals selected for eight specified positions and (2) the highest degree or certification earned by those individuals.<sup>1</sup> You state DART has no responsive information relating to two of the specified positions.<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the requestor narrowed the scope of his request and only seeks the evaluation sheets and highest degree or certification information of the individuals who were selected for the eight specified positions. Thus, only the evaluation sheets of the individuals selected for the specified positions and information regarding those individuals' highest degree or certification earned are responsive to the instant request. The remaining submitted

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<sup>1</sup>You inform us, and provide documentation showing, the requestor narrowed his request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

<sup>2</sup>The 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), 452 at 3 (1986), 362 at 2 (1983).

information is no longer responsive to the request. This ruling does not address the public availability of any information that is not responsive to the request, and DART need not release that information in response to this request.

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 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 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. This office has found the public has a legitimate interest in information relating to applicants and employees of governmental bodies and their employment qualifications. See Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); see also Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find no portion of the responsive information is highly intimate or embarrassing. Thus, DART may not withhold any of the responsive 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 responsive information pursuant to constitutional privacy, we find no portion of the responsive information is confidential under constitutional privacy. Consequently, DART may not withhold any of the responsive information under section 552.101 on that basis.

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." Gov't Code § 552.111. This section encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage

open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass internal administrative or personnel matters, and disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). However, a governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

You contend the responsive score evaluation sheets are excepted from disclosure under section 552.111. You state these documents consist of personnel matters of a broad scope and detail the "process and policy in place by which DART offers positions to applicants." However, the score evaluation sheets relate to the hiring of specific DART employees. Upon review, we find this information concerns administrative and personnel matters that do not rise to the level of policymaking in this instance. Accordingly, DART may not withhold the responsive score evaluation sheets under section 552.111.

You also assert some of the responsive information is excepted from disclosure under section 552.122 of the Government Code. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined 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 answer might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

You seek to withhold interview questions within the responsive score evaluation sheets under section 552.122. You state these interview questions were given to the applicants selected to be interviewed for the specified DART positions at issue. Having reviewed the

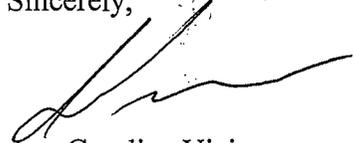
information at issue, we conclude the question we have marked evaluates an applicant's specific knowledge or ability in a particular area, and qualifies as a "test item" under section 552.122(b). We also find that release of the answer to this question would tend to reveal the question itself. Therefore, DART may withhold the information we marked pursuant to section 552.122(b). However, the remaining responsive interview questions consist of general questions evaluating an applicant's general workplace skills, subjective ability to respond to particular situations, and overall suitability for employment, and do not test any specific knowledge of an applicant. Accordingly, we determine none of the remaining responsive interview questions consist of test items for the purposes of section 552.122(b). Therefore, DART may not withhold any of the remaining responsive interview questions under section 552.122(b).

In summary, DART may withhold the information we marked under section 552.122(b) of the Government Code. The remaining responsive 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,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/eeg

Ref: ID# 409072

Enc. Submitted documents

c: Requestor  
(w/o enclosures)