



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 6, 2011

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

OR2011-05215A

Dear Ms. Thomas:

You ask this office to reconsider Open Records Letter No. 2011-05215 (2011). We note a governmental body is prohibited from asking this office to reconsider a decision issued under section 552.306 of the Government Code. *See* Gov't Code § 552.301(f). Furthermore, it is not clear this office made an error in issuing the prior ruling. Nevertheless, we have determined the prior ruling should be corrected for purposes of due process. *See id.* § 552.306. Accordingly, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2011-05215 and serves as the correct ruling.

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# 421931 (DART ORR # 7967).

Dallas Area Rapid Transit ("DART") received a request for (1) personnel information relating to a named employee and (2) the number of drivers who have been cited in bus-pedestrian accidents during a specified time interval. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted. As you do not indicate DART seeks to withhold any information that would be responsive to part two of the request, we assume DART has released any information responsive to that part of the request that was in existence when DART received

the request. If not, then DART must release any such information immediately.¹ *See id.* §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

We note one of the submitted documents pertains to an employee other than the one who is the subject of this request for information. Therefore, that document, which we have marked, does not appear to be responsive to the request. This decision does not address the public availability of information that is not responsive to the request, and DART need not release such information in response to the request.

We next note some of the responsive information falls within the scope of section 552.022 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 excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Gov't Code § 552.022(a)(1). We have marked completed reports and evaluations made of, for, or by DART that are subject to section 552.022(a)(1). Although you seek to withhold the marked information under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d at 475-76; 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 purposes of section 552.022(a)(1). Therefore, DART may not withhold any of the information encompassed by section 552.022(a)(1) under 552.103. Nevertheless, sections 552.101, 552.117, and 552.130 of the Government Code are applicable to some of the information encompassed by section 552.022(a)(1).² As those exceptions are confidentiality provisions for purposes of section 552.022(a)(1), we will address sections 552.101, 552.117, and 552.130. We also will address your claim under section 552.103 for the information that is not encompassed by section 552.022(a)(1).

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 exception encompasses information other statutes make confidential. Section 550.065(b) of the Transportation Code states that except as provided by subsection

¹We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). A governmental body must make a good-faith effort, however, to relate a request to information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990).

²This office will raise sections 552.117 and 552.130 on behalf of a governmental body, as these sections are mandatory exceptions to disclosure. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

(c) and (e), accident reports are privileged and confidential. *See* Transp. Code § 550.065(b). Section 550.065(c)(4) provides for release of an accident report to a person who provides two of the following three items of information: (1) the date of the accident; (2) the name of any person involved in the accident; and (3) the specific location of the accident. *See id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more of the items of information specified by the statute. *Id.* The submitted information includes accident reports that were completed pursuant to chapter 550 of the Transportation Code. *See id.* § 550.064 (officer's accident report). In this instance, the requestor has not provided DART with two of the three specified items of information. Therefore, DART must withhold the accident reports we have marked pursuant to section 550.065(b) of the Transportation Code.

Section 552.101 of the Government Code also encompasses constitutional and common-law rights to privacy. Constitutional privacy protects two kinds 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 relating to the "zones of privacy" pertaining to marriage, procreation, contraception, family relationships, and child rearing and education the United States Supreme Court has recognized. *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 id.* 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).

Common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined other types of information are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

We conclude the medical information we have marked is highly intimate or embarrassing and not a matter of legitimate public interest. Therefore, DART must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. We conclude DART may not withhold any of the remaining information

encompassed by section 552.022(a)(1) under section 552.101 in conjunction with constitutional or common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *See* Gov't Code §§ 552.117(a)(1), .024. We note section 552.117(a)(1) encompasses a current or former employee's personal cellular telephone number if the employee pays for the cellular telephone service with his or her personal funds. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov't Code § 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). We also note a post office box number is not a "home address" for purposes of section 552.117.³ Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request confidentiality under section 552.024. In this instance, the responsive information includes a form in which the employee to whom the information pertains timely requested confidentiality for his home address and telephone number, social security number, and information that reveals whether he has family members. We therefore conclude DART must withhold the information we have marked under section 552.117(a)(1) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130(a)(2). We have marked Texas motor vehicle information DART must withhold under section 552.130 of the Government Code.⁴

Next, we address your claim under section 552.103 of the Government Code for the information not encompassed by section 552.022(a)(1). This exception provides in part:

³*See* Open Records Decision No. 622 at 4 (1994) (legislative history makes clear purpose of Gov't Code § 552.117 is to protect public employees from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)) (emphasis added).

⁴We note Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including a Texas license plate number under section 552.130 of the Government Code.

(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.

Id. § 552.103(a), (c). A governmental body that claims 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 [1st 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).*

You state the responsive information that is not encompassed by section 552.022(a)(1) is related to a pending lawsuit filed against DART. You inform us the lawsuit was filed prior to DART's receipt of this request for information. You state the plaintiff in the lawsuit alleges her daughter was killed when she was struck by a DART bus. You explain the bus was driven by the DART employee to whom the information at issue pertains. Based on your representations and our review, we find the information at issue is related to pending litigation to which DART was a party when DART received this request for information. We therefore conclude DART may withhold the responsive information that is not encompassed by section 552.022(a)(1) under section 552.103 of the Government Code.

In reaching this conclusion, we assume the opposing party in the pending litigation has not seen or had access to any of the information encompassed by our ruling under section 552.103. The purpose of this exception is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See Open Records Decision No. 551 at 4-5 (1990).* If the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, there is no interest in withholding such information from the public under section 552.103. *See Open Records Decision Nos. 349 (1982), 320 (1982).* We also note

the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, DART (1) must withhold the information we have marked under sections 552.101, 552.117(a)(1), and 552.130 of the Government Code; (2) must release the rest of the marked information encompassed by section 552.022(a)(1) of the Government Code; and (3) may withhold the rest of the responsive information under section 552.103 of the Government Code. As we are able to make these determinations, we need not address the other exception you claim.

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,

A handwritten signature in black ink, appearing to read "James W. Morris III", with a large, stylized flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 421931

Enc: Submitted documents

c: Requestor
(w/o enclosures)