



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 1, 2011

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

OR2011-07682

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# 421318 (ORR# 8123).

Dallas Area Rapid Transit ("DART") received a request for "scanned documents included in the requisition file for the Recruiting Supervisor requisition, #3801." You claim the requested information is excepted from disclosure under sections 552.101 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted 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 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 types of information considered intimate and 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. However, 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. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs,

but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy). Likewise, information about a public employee's qualifications, disciplinary action, and background is generally not protected by common-law privacy. Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, or resignation of public employee).

You seek to withhold a memo that contains comments about the requestor and another employee because the comments "are of a personal nature that defame DART employees[,]" release of the information "would be highly objectionable[,]" and "there is no legitimate concern to the public to release this information." However, the information at issue does not concern the intimate aspects of an individual's private affairs, but instead concerns the work performance of DART employees.¹ *Indus. Found.*, 540 S.W.2d at 682-83. Therefore, we conclude the information is not confidential under common-law privacy, and DART may not withhold it from release under section 552.101 on that ground.

Section 552.101 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 at 4 (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). After review of the submitted information, we find it does not contain information that is confidential under constitutional privacy; therefore, DART may not withhold it under section 552.101 on that ground.

You assert Exhibit B 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 that 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. Whether information falls within the section 552.122 exception must be

¹We note the requestor would have a right of access under section 552.023 of the Government Code to any information DART would be required to withhold from the public to protect her privacy. See Gov't Code § 552.023(a) ("a person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests"); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves).

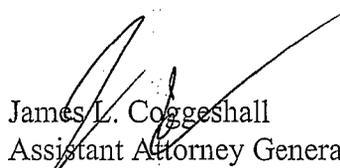
determined on a case-by-case basis. *Id.* At 6. Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Having reviewed the submitted interview questions, we conclude questions one, three, and five are "test items" for purposes of section 552.122(b). Therefore, DART may withhold these questions and their responses under section 552.122(b). However, we conclude you have not established the remaining questions are test items for purposes of section 552.122(b); therefore, you may not withhold the remaining questions and their responses under section 552.122.

To conclude, DART may withhold questions one, three, and five, and their responses, under section 552.122(b) of the Government Code. DART must release the remaining information to the requestor.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 421318

Enc. Submitted documents

c: Requestor
(w/o enclosures)