



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 19, 2011

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

OR2011-10238

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# 424347 (ORR #8195).

Dallas Area Rapid Transit ("DART") received a request for information related to three named individuals during a specified period of time.¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note section 552.022 of the Government Code is applicable to some of the submitted information. Section 552.022(a)(17) provides for required public disclosure of

¹We note DART asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²We assume that 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 that those records contain substantially different types of information than that submitted to this office.

“information that is also contained in a public court record,” unless the information is expressly confidential under other law. Gov’t Code § 552.022(a)(17). The court document we have marked in Attachment B is subject to section 552.022(a)(17). Although you seek to withhold the court document under sections 552.103 and 552.108 of the Government Code, those sections are discretionary exceptions to disclosure that protect 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 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov’t Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov’t Code § 552.108 subject to waiver). As such, sections 552.103 and 552.108 are not other law that makes information expressly confidential for the purposes of section 552.022(a)(17). Therefore, the marked court document may not be withheld under section 552.103 or section 552.108 of the Government Code. As you raise no other exception to release of this information, the marked court document must be released pursuant to section 552.022(a)(17) of the Government Code.

You seek to withhold Attachment B-1 and the remaining information in Attachment B under section 552.108 of the Government Code. Section 552.108 excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You state, and provide a representation from DART’s police department stating, that Attachments B and B-1 pertain to a pending criminal case. Based on these representations and our review of the submitted documents, we find that the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108 is generally applicable to this information.

However, we note that section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*, and includes a detailed description of the offense. *See* 531 S.W.2d at 186-87; *see also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information).

Therefore, with the exception of basic information, DART may withhold Attachment B-1 and the remaining information in Attachment B under section 552.108(a)(1).³

You seek to withhold Attachment B-2 under section 552.107(1) of the Government Code, which protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney is acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state Attachment B-2 documents a confidential communication between and among a DART employee and DART attorneys that was made in furtherance of the rendition of professional legal services to DART. You also state the communication was intended to be

³As we make this determination, we need not address your remaining claims for this information, except to note that section 552.103 of the Government Code does not generally except from disclosure the same basic information that must be released under section 552.108(c). *See* Open Records Decision No. 597 (1991).

and has remained confidential. Based on your representations and our review, we find Attachment B-2 constitutes a privileged attorney-client communication that DART generally may withhold under section 552.107 of the Government Code. We note, however, a letter attached to the privileged e-mail communication reflects it was sent to a DART attorney from a private citizen, for the purpose of stating a claim against DART. Therefore, if the letter, which we have marked, exists separate and apart from the privileged e-mail to which it is attached, DART may not withhold the letter under section 552.107(1) of the Government Code. If the marked letter does not exist separate and apart from the privileged e-mail, DART may withhold it under section 552.107(1) of the Government Code. Regardless, DART may withhold the remaining information in Attachment B-2 under section 552.107(1) of the Government Code.

Section 552.101 of the Government Code encompasses the doctrine of common-law privacy and excepts from public disclosure private information about an individual if the information (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 satisfied. *Id.* at 681-82.

Common-law privacy protects the types of information considered highly intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation*, which 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. 540 S.W.2d at 683. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure. *See* Open Records Decision Nos. 600 (1992), 545 (1990).

Upon review, we find you have failed to demonstrate how any of the information in Attachment B-3 is private. Accordingly, none of the information in Attachment B-3 is confidential under common-law privacy, and DART may not withhold any of it under section 552.101 of the Government Code on that basis.

You also claim Attachment B-3 is excepted from disclosure under constitutional privacy, which is also encompassed by section 552.101 of the Government Code. 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 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find no portion of the information in Attachment B-3 falls within the zones of privacy or otherwise implicates an individual’s privacy interests for purposes of constitutional privacy. Therefore, DART may not withhold any of Attachment B-3 under section 552.101 of the Government Code in conjunction with constitutional privacy.

We note Attachment B-3 contains information subject to section 552.130 of the Government Code.⁴ Section 552.130 excepts from disclosure information that relates to a motor vehicle operator’s or driver’s license or permit issued by an agency of this state or another state or country, or a motor vehicle title or registration issued by an agency of this state or another state or country. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov’t Code § 552.130). Accordingly, DART must withhold the information we have marked pursuant to section 552.130 of the Government Code.

We also note that some of the remaining information in Attachment B-3 is excepted from disclosure pursuant to section 552.136 of the Government Code. Section 552.136 provides that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device number for purposes of section 552.136. We conclude DART must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

In summary, with the exception of basic information, DART may withhold from disclosure under section 552.108(a)(1) of the Government Code Attachment B-1 and the information in Attachment B not subject to section 552.022(a)(17) of the Government Code. DART may generally withhold Attachment B-2 under section 552.107(1) of the Government Code, but may not withhold the non-privileged letter we have marked, if it exists separate and apart from the privileged e-mail to which it is attached. We have marked the information in

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Attachment B-3 DART must withhold under sections 552.130 and 552.136 of the Government Code.⁵ The remaining submitted information must be released to the requestor.⁶

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 424347

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including Texas driver's license and license plate numbers under section 552.130 of the Government Code and insurance policy numbers under section 552.136 of the Government Code.

⁶We 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. Gov't Code § 552.147.