



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 12, 2011

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

OR2011-11676

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# 426799 (DART ORR# 8258).

Dallas Area Rapid Transit ("DART") received a request for the personnel records of two named individuals. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is non-responsive because it pertains to an individual not named in the request. We note the requestor only seeks the personnel records of two named individuals. Thus, any information outside the scope of the present request is not responsive. This ruling does not address the public availability of non-responsive information, and DART need not release the non-responsive 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. Section 552.101 encompasses section 402.083 of the Labor Code, which provides that "[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the [Division of Workers' Compensation of the Texas Department of Insurance (the "division")] except as provided by this subtitle or other

law.” Labor Code § 402.083. In Open Records Decision No. 533 (1989), this office construed the predecessor to section 402.083(a) to apply only to information the governmental body obtained from the Industrial Accident Board, subsequently the Texas Workers’ Compensation Commission, and now the division. *See* Open Records Decision No. 533 at 3-6 (1989); *see also* Labor Code § 402.086 (transferring confidentiality conferred by section 402.083(a) of the Labor Code to information other parties obtain from division files). Accordingly, information in the possession of DART that was not obtained from the division may not be withheld on the basis of section 402.083(a). Although you assert some of the submitted information is confidential pursuant to section 402.083, you provide no representation, and the documents do not reflect, that DART received these records from the division. Therefore, you have failed to demonstrate the applicability of section 402.083 to the submitted information, and it may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses information protected by other statutes, such as the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has determined that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1988), 370 (1983), 343 (1982). We have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” *See* Open Records Decision No. 546 (1990). Pursuant to the MPA, medical records must be released upon the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, 159.005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision

No. 565 at 7 (1990). Upon review, we find the information we have marked constitutes medical records under the MPA, and thus may only be released in accordance with the MPA.

Section 552.101 of the Government Code also encompasses section 258.102 of the Occupations Code, which provides in pertinent part as follows:

(a) The following information is privileged and may not be disclosed except as provided by this subchapter:

- (1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and
- (2) a dental record.

Occ. Code § 258.102(a). A “dental record” means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See id.* § 258.101(1). Information that is privileged under chapter 258 of the Occupations Code may be disclosed only under certain specified circumstances. *See id.* § 258.104 (consent to disclosure); *see also id.* §§ 258.105, .106, .107 (exceptions to privilege). The written consent for the release of privileged information required under section 258.104 must specify (1) the information covered by the release, (2) the person to whom the information is to be released, and (3) the purpose for the release. *Id.* § 258.104(c). A person who receives information that is privileged under section 258.102 of the Occupations Code may disclose that information to another person only to the extent that disclosure is consistent with the purpose for which the information was obtained. *See id.* § 258.108. Accordingly, DART must withhold the dental records we have marked under section 258.102 of the Occupations Code unless DART receives the required consent for release of those records under section 258.104 of the Occupations Code.¹

Section 552.101 encompasses section 1304(b) of title 8 of the United States Code, which addresses the confidentiality of records of the registration of aliens under section 1301 of the United States Code. Section 1304(b) provides:

(b) Confidential Nature

All registration and fingerprint records made under the provisions of this subchapter shall be confidential, and shall be made available only

- (1) pursuant to section 1357(f)(2) of this title, and

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

(2) to such persons or agencies as may be designated by the Attorney General.

8 U.S.C. § 1304(b). Upon review, we find the alien registration number we have marked is confidential under title 8, section 1304(b) of the United States Code and must be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The type 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. This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See Open Records Decision Nos. 343* (1982) (references in emergency medical records to drug overdoses, acute alcohol intoxication, obstetrical or gynecological illnesses, convulsions or seizures, and emotional or mental distress), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure).

Common-law privacy also encompasses certain types of personal financial information. Financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See Open Records Decision Nos. 600* at 9-12 (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g., ORD 600* at 9-12 (participation in TexFlex), 545 at 3-5 (deferred compensation plan). Likewise, the details of an employee's enrollment in a group insurance program, the designation of the beneficiary of an employee's retirement benefits, and an employee's authorization of direct deposit of the employee's salary are protected by

common-law privacy. *See* ORD 600 at 9-12. However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. *Id.* Furthermore, an employee's decision to take sick leave is not protected under common-law privacy. *See* Open Records Decision Nos. 423 at 2 (1984) (scope of public employee privacy is narrow), 336 at 2 (1982) (names of employees taking sick leave and dates of sick leave taken not private). This office has also found that 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. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, DART must withhold this marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, you have not demonstrated how the remaining information is highly intimate or embarrassing or the information is of legitimate public concern. Thus, the remaining information may not be withheld under section 552.101 in conjunction with common-law privacy.

You also raise constitutional privacy, which is also encompassed by section 552.101 of the Government Code. 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 constitutionally protected interest is an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *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* ORD 455 at 7. 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*, 765 F.2d at 492). Upon review, we find no portion of the remaining information falls within the zones of privacy or otherwise implicates an individual's privacy interests for purposes of constitutional privacy. Accordingly, none of the remaining information may be withheld under section 552.101 in conjunction with constitutional privacy.

Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is discussed above. *See Indus.*

Found., 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court recently expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163, at *5 (Tex. Dec. 3, 2010). The supreme court then considered the applicability of section 552.102, and has held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Id.* at *10. We have marked the information DART must withhold under section 552.102(a) of the Government Code. The remaining information is not excepted under section 552.102(a) of the Government Code and may not be withheld on that basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). 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). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or 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. We note the submitted information includes an election form showing that one of the named individuals elected to deny access to his home address and home telephone number prior to DART receiving the present request for information. Accordingly, DART must withhold the information we have marked pertaining to this individual under section 552.117 of the Government Code. However, the election form provides no means for the employee to request that his emergency contact information, social security number, or family member information be withheld from disclosure under section 552.117(a)(1). Thus, because the employee did not elect confidentiality for his emergency contact information, social security number, or family member information, DART may not withhold any of this information as it pertains to this individual under section 552.117 of the Government Code. The submitted information does not reveal, however, whether the other named employee elected to withhold personal information pursuant to section 552.024; thus, we must rule conditionally. To the extent the other individual timely elected to keep his personal information confidential pursuant to section 552.024, DART must withhold the information we have marked pertaining to this individual under section 552.117. However, DART may not withhold this information under section 552.117 if this individual did not make a timely election to keep his personal information confidential.

Section 552.122(a) of the Government Code excepts from disclosure “[a] test item developed by an educational institution that is funded wholly or in part by state revenue[.]” Gov’t Code § 552.122(a). Section 552.122(b) of the Government Code excepts from disclosure “a test item developed by a . . . governmental body[.]” Gov’t Code § 552.122(b). 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. 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 answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

You seek to withhold the submitted DART Bus Operator Examination, DART Bus Operator Final Examination, and Defensive Driving Quiz, as well as the corresponding answers, under section 552.122 of the Government Code. You state the submitted exams evaluate an individual’s knowledge or ability to perform as a DART bus operator and are mandatory. You inform us DART anticipates using these questions on future examinations and argue that release of this information would be detrimental because it would provide an unfair advantage to future DART bus operators, thereby impairing DART’s ability to evaluate qualified individuals. Because you acknowledge that DART is a governmental unit operating a regional public transit system, and not “an educational institution . . . funded wholly or in part by state revenue,” we find that section 552.122(a) is not applicable to any of the information at issue. Having considered your arguments and reviewed the submitted information, we find that the information we have marked qualifies as test items for the purposes of section 552.122(b). We also find that release of the answers to these questions, which we have also marked, would tend to reveal the questions themselves. Therefore, DART may withhold the information we have marked under section 552.122(b) of the Government Code. However, the remaining questions are general questions or statements evaluating the applicant’s individual abilities, personal opinions, general workplace skills, subjective ability to respond to particular situations, and overall suitability for employment, and do not test any specific knowledge of the applicant. We find you have failed to explain how the remaining submitted information constitutes a test item for purposes of section 552.122. Accordingly, we determine the remaining submitted information does not consist of test items under section 552.122(b) and may not be withheld on that basis.

Section 552.130 provides in relevant part:

- (a) Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country;
- (2) a motor vehicle title or registration issued by an agency of this state or another state or country; or
- (3) a personal identification document issued by an agency of this state or another state or country or a local agency authorized to issue an identification document.

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). DART must withhold the driver's license information we have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The e-mail address we have marked is not a type specifically excluded by section 552.137(c). Accordingly, DART must withhold the e-mail address we have marked under section 552.137 of the Government Code unless the owner of the address has affirmatively consented to its release under section 552.137(b).²

In summary: (1) DART must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA; (2) DART must withhold the dental records we have marked under section 258.102 of the Occupations Code unless DART receives the required consent for release of those records under section 258.104 of the Occupations Code; (3) DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1304 of title 8 of the United States Code; (4) DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (5) DART must withhold the information we have marked under section 552.102 of the Government Code; (6) DART must withhold the home address and home telephone number, which we have marked, that pertains to the individual who timely elected to keep this information confidential under section 552.117 of the Government Code; to the extent the other individual timely elected to keep his personal information confidential pursuant to section 552.024, DART must withhold his personal information, which we have marked,

²We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number under section 552.130 of the Government Code and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

under section 552.117; (7) DART may withhold the information we have marked under section 552.122 of the Government Code; (8) DART must withhold the information we have marked under section 552.130 of the Government Code; and (9) DART must withhold the e-mail address we have marked under section 552.137 of the Government Code unless the owner of the address has affirmatively consented to its release under section 552.137(b). The remaining information must be released.³

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,



Kirsten Brew
Assistant Attorney General
Open Records Division

KB/em

Ref: ID# 426799

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the remaining information contains 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. *See* Gov't Code § 552.147(b).