



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 29, 2011

Ms. Halfreda Anderson Nelson
Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2011-14088

Dear Ms. Nelson:

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# 431371 (DART ORR No. 8366).

Dallas Area Rapid Transit ("DART") received a request for the complete file of a deceased former employee. You claim the submitted information is excepted from disclosure pursuant to sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (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. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to

allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, we note that privacy is a personal right that lapses at death, and, thus, common-law privacy is not applicable to information that relates only to a deceased individual. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981).

The submitted information consists of the deceased former employee's personnel file and includes information pertaining to the former employee's life insurance. Generally, we find that the decision to obtain life insurance is a private, financial decision that is excepted from disclosure under common-law privacy pursuant to section 552.101. As previously noted, the right to privacy lapses at death. *See Moore*, 589 S.W.2d at 491. Thus, that individual's right to privacy has lapsed, and the information relating to him may not be withheld on that basis. However, the beneficiaries of an insurance policy have a separate right to privacy. Therefore, information that would reveal a beneficiary's identity is protected by common-law privacy. Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, DART must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. We note, the requestor, as one of the beneficiaries, has a special right of access to information that pertains to her and such information may not be withheld. *See Gov't Code § 552.023* (a person has a special right of access to information that is excepted from public disclosure under laws intended to protect the person's privacy interest as subject of the information). Further, we find you have failed to demonstrate the remaining information may be withheld under section 552.101 on the basis of common-law privacy.

Section 552.101 of the Government Code also encompasses the constitutional right to 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. *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 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. Open Records Decision No. 455 at 4 (1987). 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.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). Because the constitutional right to privacy is a personal right that lapses at death, it does not encompass information that relates to a deceased individual. *See Moore*, 587 S.W.2d at 491; ORD 272. Upon review, we find

no portion of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. We therefore conclude DART may not withhold any of the remaining information under section 552.101 in conjunction with constitutional privacy.

You claim the remaining information is excepted from disclosure under section 552.102 of the Government Code. 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). However, we note section 552.102(a) protects the privacy interests of individuals, and the right the privacy lapses at death. *See Moore*, 587 S.W.2d at 491. Upon review, we find none of the remaining information is excepted under section 552.102(a) of the Government Code, and none of the remaining information may be withheld on that basis.

We note portions of the remaining information are subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024.¹ 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)). As noted above, the employee whose information is the subject of the request is deceased. Because the protection afforded by section 552.117 includes "current or former" officials or employees, we note the protection generally does not lapse at death, as it is also intended to protect the privacy of the employee's family members. We note, however, because the protection of social security numbers under section 552.117 is intended solely to protect the privacy of the employee, it lapses at death. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229; H-917. 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. The submitted information reflects the deceased former employee elected to keep personal information confidential before DART received the request for information. In this instance, the requestor is the widow of the deceased former employee whose information is at issue. Accordingly, the requestor has a special right of access to information concerning herself under section 552.023 of the Government Code. Thus, DART may not withhold any of the information pertaining to the requestor under section 552.117 of the Government Code. However, DART must withhold the remaining information pertaining to the deceased former

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

employee we have marked under section 552.117(a)(1). The remaining information appears to contain the personal information of another DART employee. Accordingly, DART must also withhold this information, which we have marked, under section 552.117(a)(1) if it pertains to a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If this employee did not timely elect confidentiality for the marked information, it may not be withheld under section 552.117(a)(1).

Next, we note portions of the remaining information are subject to section 552.136 of the Government Code, which 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”). Section 552.136 also protects privacy interests. *See Moore*, 589 S.W.2d at 491; ORD 272 at 1. Therefore, the bank account and routing numbers pertaining to the deceased individual may not be withheld under this exception based on the deceased individual’s interest. However, if a living individual has an interest in the bank account and routing numbers, DART must withhold the information we have marked under section 552.136 of the Government Code. We note, if the requestor has an interest in the bank account and routing numbers, she has a special right of access to this information. *See Gov’t Code* § 552.023. However, if the marked bank account and routing numbers pertain to accounts in which a living person, who is not the requestor, has an interest, they must be withheld under section 552.136 of the Government Code.

In summary, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. DART must withhold the information pertaining to the deceased employee we have marked under section 552.117(a)(1). DART must withhold the remaining information we have marked under section 552.117(a)(1) to the extent the marked information pertains to a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the marked bank account and routing numbers pertain to accounts in which a living person, who is not the requestor, has an interest, they must be withheld under section 552.136 of the Government Code. DART must release the remaining information.²

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.

²Because the requestor has a special right of access to some of the information being released, DART must again seek a decision from this office if it receives another request for the same information from another requestor.

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 "Jennifer Burnett", with a long horizontal line extending to the right.

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 431371

Enc. Submitted documents

c: Requestor
(w/o enclosures)