



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 15, 2011

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

OR2011-16834

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# 436116 (DART ORR 8480).

Dallas Area Rapid Transit ("DART") received a request for all records pertaining to a named DART police officer. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.1175, 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. Section 552.101 encompasses section 1701.306 of the Occupations Code, which provides:

(a) The [Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE")] may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to [TCLEOSE]. A declaration is not public information.

Occ. Code § 1701.306(a)-(b). Upon review, we find the submitted L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms, which we have marked, are confidential under section 1701.306 of the Occupations Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses section 1703.306 of the Occupations Code. Section 1703.306 provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Id. § 1703.306. Some of the remaining information, which we have marked, consists of information acquired from a polygraph examination subject to section 1703.306. The requestor does not appear to fall into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, DART must withhold the marked polygraph information under section 552.101 in conjunction with section 1703.306 of the Occupations Code. However, none of the remaining information is confidential under section 1703.306, and it may not be withheld under section 552.101 on that basis.

Section 552.101 also encompasses the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs the public availability of medical records. *See id.* §§ 151.001-165.160. Section 159.002 of the MPA provides in pertinent part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

Id. § 159.002(a)-(c). This office has concluded 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 (1987), 370 (1983), 343 (1982).* Upon review, we find DART must withhold the information we have marked under section 552.101 in conjunction with the MPA. However, none of the remaining information consists of medical records for the purposes of the MPA. Thus, none of the remaining information may be withheld under section 552.101 on that basis.

Section 552.101 also encompasses chapter 611 of the Health and Safety Code. Section 611.002 provides in pertinent part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, .0045; *see also* Open Records Decision No. 565 (1990). Upon review, we find the information we have marked consists of a mental health record that is subject to chapter 611 of the Health and Safety Code. Accordingly, DART must withhold the marked mental health record under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.

Section 552.101 also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. This office has 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. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Additionally, this office has also found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure. *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), 455 at 9 (1987) (employment applicant’s salary information not private), 423 at 2 (1984) (scope of public employee privacy is narrow). Additionally, this office has found a compilation of an individual’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U. S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual’s criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Moreover, a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public. Determinations under common-law privacy must be made on a case-by-case basis. *See Indus. Found.*, 540 S.W.2d at 685 (whether matter is of legitimate interest to public can be considered only in context of each particular case); Open Records Decision No. 373 at 4 (1983). However, information relating to routine traffic violations is not excepted from release under common-law privacy. *Cf. Gov’t Code* § 411.082(2)(B) (criminal history record information does not include driving record information). Additionally, we note criminal history information obtained by a law enforcement agency in the process of hiring a peace officer is a matter of legitimate public interest. We also note the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions 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), 542 (1990), 470 at 4 (public has

legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (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. Accordingly, DART must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, we find the remaining information is either not highly intimate or embarrassing or is of legitimate concern to the public. Consequently, DART may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

DART claims portions of the remaining information are 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). We note DART asserts 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 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. Having carefully reviewed the submitted information, we have marked the information DART must withhold under section 552.102(a). We find, however, none of the remaining information may be withheld on that basis.

You assert the submitted daily observation reports are excepted under section 552.108 of the Government Code. Section 552.108(b)(1) excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). This section is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded that this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed guidelines regarding police department’s use of force policy), 508 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). To

claim this aspect of section 552.108 protection, however, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common-law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) exempts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

Upon review, we find you have not established how public access to the daily observation reports would interfere with law enforcement or endanger DART officers. Accordingly, DART may not withhold this information under section 552.108(b)(1) of the Government Code.

DART raises section 552.108(b)(2) of the Government Code for the background investigator's report. Section 552.108(b)(2) exempts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Gov't Code § 552.108(b)(2). A governmental body claiming section 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). We note section 552.108 is generally not applicable to records of an internal investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Ellen*, 840 S.W.2d at 525-26 (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution). The records at issue are personnel documents maintained by DART for administrative purposes. You have not demonstrated the this information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Accordingly, you have failed to demonstrate section 552.108(b)(2) applies. Thus, DART may not withhold any portion of the remaining information under section 552.108(b)(2).

Although DART raises section 552.1175 of the Government Code, we note section 552.117 of the Government Code is the proper exception to raise for the portions of information in

that DART holds in its capacity as an employer.¹ Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, personal pager and cellular telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code.² 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)(2)). We note section 552.117 is applicable to a personal pager or cellular phone number only if it is paid for by a governmental body. *See* Open Records Decision No. 670 at 6 (2001) (statutory predecessor to section 552.117(a)(2) encompassed personal cellular phone numbers and personal pager numbers of peace officers who purchased cellular or pager service with their personal funds). Accordingly, DART must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, DART may withhold the marked cellular telephone numbers only if the individual pays for the cellular telephone service with personal funds. As to the remaining information at issue, we find it is not subject to section 552.117 of the Government Code, and DART may not withhold it on that basis.

Section 552.1175 of the Government Code provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(b) Information that relates to the home address, home telephone number, emergency contact information, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

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).

²Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure.

Gov't Code § 552.1175(a)(1); Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 3 (to be codified as an amendment to Gov't Code § 552.1175(b)). To the extent the information we have marked relates to peace officers as defined by article 2.12 of the Code of Criminal Procedure and the peace officers elect to restrict access to the information pertaining to them in accordance with section 552.1175(b), DART must withhold the marked information in under section 552.1175 of the Government Code.

Section 552.122 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 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.

DART seeks to withhold the submitted interview questions and the answers provided to those questions under section 552.122 of the Government Code. Having considered DART’s arguments and reviewed the information at issue, we find the questions we have marked are test items under section 552.122(b) of the Government Code. We also find the answers we have marked would tend to reveal the questions. Therefore, DART may withhold the information we have marked under section 552.122 of the Government Code. However, DART has not demonstrated how the remaining information at issue consists of test items for the purpose of section 552.122. Accordingly, DART may not withhold the remaining information at issue under section 552.122 of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title, or registration issued by an agency of this state or an agency of another state or country is excepted from public release. 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). Upon review, we find DART must withhold the motor vehicle record information we have marked in the remaining information under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code states 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). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining “access device”). Therefore, DART must withhold the information we have marked under section 552.136 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). *See id.* § 552.137(a)-(c). The e-mail addresses we have marked are not specifically excluded by section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

Section 552.140 provides in part:

- (a) This section applies only to a military veteran’s Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Id. § 552.140(a). Section 552.140 provides a military veteran’s DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a)-(b). From the submitted information, we are able to determine DART was first in possession of the military discharge form after September 1, 2003. Accordingly, DART must withhold this form, which we have marked, pursuant to section 552.140 of the Government Code.

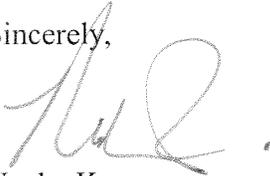
In summary, DART must withhold the following information under section 552.101 of the Government Code: (1) the L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms in conjunction with section 1701.306 of the Occupations Code; (2) the marked polygraph information in conjunction with section 1703.306 of the Occupations Code; (3) the marked medical records in conjunction with the MPA; (4) the marked mental health records in conjunction with section 611.002 of the Health and Safety Code; and (5) the information we have marked in conjunction with common-law privacy. DART must withhold the information we have marked under section 552.102(a) of the Government Code. DART must also withhold the information we marked under section 552.117(a)(2) of the Government Code; however, DART may withhold the marked cellular telephone numbers only if the individual pays for the cellular telephone service with personal funds. To the extent the information we have marked relates to peace officers as defined by article 2.12 of the Code of Criminal Procedure and the peace officers elect to restrict access to the information pertaining to them in accordance with section 552.1175(b), DART must withhold the marked information in under section 552.1175 of the Government Code. DART may withhold the information we have marked under section 552.122 of the Government Code. DART must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. DART must withhold the information we have marked under section 552.136 of the Government Code. DART must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses have

affirmatively consented to their release. DART must withhold the submitted DD-214 form, which we have marked, pursuant to section 552.140 of the Government Code.³ The remaining information must be released.⁴

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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/em

Ref: ID# 436116

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

³We note Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold ten categories of information, including L-2 and L-3 declarations under section 552.101 in conjunction with section 1701.306 of the Occupations Code, an e-mail address of a member of the public under section 552.137 of the Government Code, and a Form DD-214 under section 552.140 of the Government Code, without the necessity of requesting an attorney general decision.

⁴We note 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.