



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 9, 2011

Mr. Hyattye Simmons
General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2011-18165

Dear Mr. Simmons:

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# 438494 (DART ORR 8544).

Dallas Area Rapid Transit ("DART") received a request for the civil service file, employment file, and disciplinary records related to a named former DART officer. You state some information has been released to the requestor. You claim the submitted information is excepted from disclosure pursuant to sections 552.101, 552.102, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the requestor has excluded from her request social security numbers, driver's license numbers, and home addresses. Thus, these types of information are not responsive to this request. This ruling does not address the public availability of any information that is not responsive to the request, and DART need not release such 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

¹Although you raise section 552.1175 of the Government Code, we note section 552.117 of the Government Code is the proper exception to raise for information DART holds in its capacity as an employer.

Code § 552.101. Section 552.101 encompasses information protected by other statutes, including section 58.007 of the Family Code, which makes confidential juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997. The relevant language of section 58.007 reads:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). For purposes of section 58.007(c), “child” means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2). Incident report DC08001863 was developed by DART and involves alleged juvenile delinquent conduct that occurred after September 1, 1997. *See id.* § 51.03(a) (defining “delinquent conduct” for the purposes of section 58.007). It does not appear any of the exceptions in section 58.007 of the Family Code apply. Therefore, we find DART must withhold incident report DC 08001863 in its entirety under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. We note, however, section 58.007 is not applicable to information that relates to a juvenile as a complainant, victim, witness, or other involved party and not as a suspect or offender. The remaining report you seek to withhold, DC08001697, does not identify a juvenile as a suspect or offender. Therefore, section 58.007(c) does not apply to report DC08001697, and DART may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to the Texas Commission on Law Enforcement Officers Standards and Education (“TCLEOSE”) under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

(a) All information submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under [the Act], unless the person

resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release information submitted under this subchapter.

Act of May 23, 2011, 82nd Leg., R.S., S.B. 545, § 4 (to be codified as an amendment to Occ. Code § 1701.454). The remaining information includes an F-5 (“Report of Separation of Licensee”) report, which does not indicate the officer at issue resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, DART must withhold the submitted F-5 report pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 of the Government Code 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. The type of information considered intimate or 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 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), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find the information we marked is highly intimate or embarrassing and not of legitimate public concern. Accordingly, DART must withhold the information we 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.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or section 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)). You state the information at issue pertains to a former DART officer. It is unclear whether or not the former DART officer is currently a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure. Thus, if the former DART officer is a currently licensed peace officer as defined by article 2.12, DART must withhold the information we have marked under section 552.117(a)(2) of the Government Code. If, however, the former DART officer is not a currently licensed peace officer, this personal information may not be withheld under section 552.117(a)(2) of the Government Code.

However, if the former DART officer is no longer a licensed peace officer, then this personal information may be 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 this information be kept confidential under section 552.024 of the Government Code. 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 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

²“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

information. You provide documentation showing the former DART officer elected to restrict access to his personal information under section 552.024. Thus, if the former DART officer is no longer a licensed peace officer as defined by article 2.12, DART must withhold this information, which we have marked, under section 552.117(a)(1) of the Government Code.

We note a portion of the remaining information is subject to section 552.130 of the Government Code.³ Section 552.130 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, 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). Accordingly, DART must withhold the information we have marked 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 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 insurance policy number we have marked pursuant to 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 address we have marked is not specifically excluded by section 552.137(c). As such, this marked e-mail address must be withheld under section 552.137, unless the owner of the address has affirmatively consented to its release. *See id.* § 552.137(b).⁴

In summary, DART must withhold under section 552.101 of the Government Code: (1) incident report DC08001863 in conjunction with section 58.007(c) of the Family Code; (2) the F-5 report in conjunction with section 1701.454 of the Occupations Code; and (3) the information we marked in conjunction with common-law privacy. DART must also withhold the information we have marked under section 552.102(a) of the Government Code.

³The 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).*

⁴This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including 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.

If the former DART officer is a currently licensed peace officer as defined by article 2.12, DART must withhold the information we have marked under section 552.117(a)(2) of the Government Code. If the former DART officer is no longer a peace officer as defined by article 2.12, then DART must withhold the information we have marked under section 552.117(a)(1) of the Government Code. DART must withhold the information we have marked under sections 552.130 and 552.136 of the Government Code. DART must also withhold the marked e-mail address under section 552.137, unless the owner of the address has affirmatively consented to its release. DART must release the remaining responsive information.

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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/ag

Ref: ID# 438494

Enc. Submitted documents

c: Requestor
(w/o enclosures)