



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 3, 2012

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

OR2012-00093

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# 441021 (DART ORR# 8583).

Dallas Area Rapid Transit ("DART") received a request for any and all documents pertaining to the investigation and discharge of two named individuals. You state DART has released some information to the requestor. You claim that the remaining information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

Initially, we note a portion of submitted information is a completed report subject to section 552.022(a)(1) of the Government Code. Section 552.022 provides in part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). DART may only withhold the report subject to section 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under the Act or other law. The Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the report in Attachment B.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has

not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert the report in Attachment B is a confidential communication by a DART attorney to DART's general counsel. You state the report provides legal analysis of the alleged misconduct of DART employees and was not intended to be disclosed to third parties. Based on these representations and our review of the information at issue, we conclude DART may withhold the report under Texas Rule of Evidence 503.

Next, we consider your argument under section 552.107 of the Government Code for the email and attachments in Attachment B. Section 552.107(1) protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for rule 503. 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 the email in Attachment B is a confidential communication between a DART attorney and a DART employee for the purposes of providing legal services to DART. You also state the communication is confidential and was not intended to be communicated to anyone other than the parties to the email. Based on these representations and our review of the information at issue, we conclude the email we have marked in Attachment B constitutes a privileged attorney-client communication. Accordingly, the city may withhold the marked email with attachments under section 552.107(1) of the Government Code.

Section 552.101 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 6103(a) of title 26 of the United States Code. Prior decisions of this office have held that section 6103(a) renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or . . . the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Therefore, we conclude

that information pertaining to a tax levy constitutes “tax return information” as contemplated by section 6103(a) of title 26 of the United States Code. *See Johnson v. Sawyer*, 120 F.3d 1307, 1330 (5th Cir. 1997) (tax return information is confidential unless disclosure is permitted by exception found in section 6103) (citing *Chandler v. United States*, 687 F. Supp. 1515, 1516 n.1 (C.D. Utah 1988), *aff’d*, 887 F.2d 1397 (10th Cir. 1989) (notice of levy disclosed tax return information)). Accordingly, DART must withhold the tax information we have marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also encompasses constitutional and common-law rights to privacy. Common-law privacy 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 established. *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. Further, this office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee’s retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and 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, this office has found the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

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. The first is the interest in independence in making certain important decisions relating to the “zones of privacy” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education the United States Supreme Court has recognized. *See Fadjo v. Coon*, 633 F.2d 1172 (5<sup>th</sup> 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 (5<sup>th</sup> 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. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs” and the scope of information protected is narrower than that under the common-law doctrine of privacy. *Id.* at 5 (internal quotations omitted) (quoting *Ramie*, 765 F.2d at 492).

You contend portions of the submitted information are protected under common-law and constitutional privacy. Upon review, we agree a portion of Attachment C 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. However, we find you have not demonstrated the remaining information is highly intimate or embarrassing and not a matter of legitimate public interest. We also find you have not demonstrated that any of the remaining information falls within the constitutional zones of privacy or that an individual’s privacy interests outweigh public interest in the information. We therefore conclude DART may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with constitutional or common-law 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.”<sup>1</sup> Gov’t Code § 552.102(a). The Texas Supreme Court recently 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. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the remaining information, we conclude DART must withhold the information we have marked in Attachment C under section 552.102(a) of the Government Code.

Section 552.117 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. Gov’t Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only 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 information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individuals at issue timely requested confidentiality under section 552.024, DART must withhold the personal information we have marked in Attachment C under

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<sup>1</sup>The 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).

section 552.117(a)(1). Conversely, to the extent these individuals did not make timely elections under section 552.024, DART may not withhold this information under section 552.117(a)(1) of the Government Code.<sup>2</sup>

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license or permit, motor vehicle title, or registration issued by an agency of Texas, another state, or another country is excepted from public release. Gov't Code § 552.130(a). DART must withhold the driver's license number we have marked under section 552.130 of the Government Code.

The remaining information includes information that is subject to section 552.136 of the Government Code. Section 552.136 provides, "[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). Accordingly, DART must withhold the information we have marked under section 552.136 of the Government Code.

In summary, DART may withhold the completed report in Attachment B under rule 503 of the Texas Rules of Evidence and the email with attachments we have marked under section 552.107(1) of the Government Code. In Attachment C, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code and common-law privacy. Additionally, DART must withhold the information we have marked under section 552.102(a), the driver's license number we have marked under section 552.130, and the information we have marked under section 552.136 of the Government Code. To the extent the individuals at issue timely requested confidentiality under section 552.024, DART must withhold these individuals' personal information under section 552.117(a)(1) of the Government Code. The remaining information must be released.

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](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

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<sup>2</sup>Regardless of the applicability of section 552.117 of the Government Code, we 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. *See* Gov't Code § 552.147(b).

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 cursive script, appearing to read "Michelle R. Garza", with a long horizontal flourish extending to the right.

Michelle R. Garza  
Assistant Attorney General  
Open Records Division

MRG/em

Ref: ID# 441021

Enc. Submitted documents

c: Requestor  
(w/o enclosures)