



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 27, 2012

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

OR2012-06112

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# 451856 (DART ORR Nos. 8812, 8814, 8816, 8820).

Dallas Area Rapid Transit ("DART") received four requests for information regarding a named DART officer, including her photograph and personnel records, and all disciplinary reports, shooting investigations, and officer training records. You state you have released some of the requested information. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.119, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which constitutes a representative sample.¹

Initially, we note some of the submitted information contained in the dispatch records is not responsive to the present request for information because it does not relate to the named officer or any shooting investigation. This decision does not address the public availability of the non-responsive information and such information need not be released in response to the present request.

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Next, you inform us that some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-12169 (2011). In that ruling, we determined DART may withhold the test questions and responses in DART's oleoresin capsicum aerosol and collapsible baton basic exams under section 552.122 of the Government Code. We have no indication that the law, facts, and circumstances on which the prior ruling was based have changed. Thus, we agree DART may continue to rely on Open Records Letter No. 2011-12169 with respect to these test questions and responses, which we have marked. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

You seek to withhold the information in Attachments B-1, B-2, B-3, and B-4 under section 552.108 of the Government Code. Section 552.108 provides, in pertinent part, the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

...

(b) An 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 is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution; [or]

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Id. § 552.108(a)(1)-(2), (b)(1)-(2). Subsections 552.108(a)(1) and 552.108(b)(1) are mutually exclusive of subsections 552.108(a)(2) and 552.108(b)(2). Subsection 552.108(a)(1) protects information, the release of which would interfere with a particular

pending criminal investigation or prosecution, while subsection 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would interfere with law enforcement and prosecution efforts in general. In contrast, subsections 552.108(a)(2) and 552.108(b)(2) protect information that relates to a concluded criminal investigation or prosecution that did not result in a conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note section 552.108 is generally not applicable to records of an internal affairs 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.); *Morales v. Ellen*, 840 S.W.2d 519, 525-526 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982).

You state the documents in Attachment B-1 relate to a pending criminal investigation by the DART police department and the Richardson police department into a shooting incident on February 7, 2012 at a DART station involving a DART officer. You further state that the documents in Attachments B-2, B-3, and B-4 consist of DART's internal investigation and criminal investigation files and the Dallas police department's criminal investigation files related to a 2007 shooting incident involving the DART officer. You state the files in Attachments B-2, B-3, and B-4 are currently being reviewed by the DART and Richardson police departments as part of the pending investigation into the 2012 shooting incident. Thus, we understand you to raise section 552.108(a)(1) for Attachments B-1, B-2, B-3, and B-4. Based on your representations and our review, we conclude release of the information in Attachments B-1, B-2, B-3, and B-4 would interfere with the detection, investigation, or prosecution of crime. *See Houston Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, we find section 552.108(a)(1) is applicable to this information.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-87; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Therefore, with the exception of basic information, DART may withhold the information in Attachments B-1, B-2, B-3, and B-4 under section 552.108(a)(1) 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. *Id.* 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); Open Records Decision No. 626 at 8.

You state that the remaining test questions in Attachment C are designed to evaluate DART police officers’ “knowledge of the position and skill as an officer.” You inform us that the questions are used on a continuing basis and that release of the test items would be “detrimental to future testing of DART police officers.” Having considered your arguments and reviewed the information at issue, we find the information we have marked constitutes “test items” under section 552.122(b) of the Government Code. We also find the answers to the questions we have marked would tend to reveal the questions. Therefore, DART may withhold the marked test questions and answers under section 552.122 of the Government Code. However, we find none of the remaining information consists of “test items” for the purposes of section 552.122 and DART may not withhold the remaining information under section 552.122 of the Government Code.

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. This section encompasses information protected by other statutes, such as section 143.090 of the Local Government Code. Section 143.090 provides as follows:

A department, [the Fire Fighters’ and Police Officers’ Civil Service Commission], or municipality may not release a photograph that depicts a police officer unless:

- (1) the officer has been charged with an offense by indictment or by information;
- (2) the officer is a party in a civil service hearing or a case before a hearing examiner or in arbitration;
- (3) the photograph is introduced as evidence in a judicial proceeding;
or
- (4) the officer gives written consent to the release of the photograph.

Local Gov’t Code § 143.090. You claim the submitted photograph of the DART officer is excepted from disclosure under section 143.090. You state that “the DART police department and its police officers substantially comply with chapter 143 of the Local Government Code. However, DART is not a civil service city as defined under chapter 143

of the Local Government Code. We note the provisions of chapter 143 of the Local Government Code only apply to civil service cities. Because DART is not a civil service city, section 143.090 is inapplicable to the submitted photograph. Thus, the submitted photograph may not be withheld under section 552.101 of the Government Code on that basis.

You also claim the submitted photograph of the DART officer is excepted from disclosure under section 552.119 of the Government Code. Section 552.119 provides the following:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. After review of your arguments, we find you have not demonstrated, and it is not apparent from our review of the submitted information, that release of the photograph at issue would endanger the life or physical safety of the peace officer depicted. Therefore, DART may not withhold the submitted photograph under section 552.119. As you raise no further exception to disclosure of the submitted photograph, it must be released.

Section 552.101 of the Government Code also encompasses information protected by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which provides in relevant 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.

Occ. Code § 159.002(a)-(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 (1987), 370 (1983), 343 (1982). The 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. Occ. Code §§ 159.004, .005. Medical records may be released only as provided under the MPA. ORD 598. We note the remaining information contains medical records of the DART officer. Upon review, we find the medical records we have marked may only be released in accordance with the MPA.

Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information 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 some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and handicaps). Additionally, 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. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public.

Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, we conclude DART must withhold the information we have marked under section 552.101 in conjunction with common-law

privacy. However, a portion of the information you seek to withhold under common-law privacy consists of criminal history information that was provided by the named officer on her application for employment with DART. Thus, the information was not compiled by any governmental body. Moreover, we find no portion of the remaining information is highly intimate or embarrassing information of no legitimate public concern. Consequently, none of the remaining information may be withheld under section 552.101 in conjunction with common-law 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. ORD 455 at 4. 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. *Id.* 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.* The scope of information protected is narrower than under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find no portion of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for the purposes of constitutional privacy. Consequently, DART may not withhold any of the remaining information under section 552.101 in conjunction with constitutional privacy.

Section 552.102(a) of the Government Code 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). 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.*, 354 S.W.3d 336 (Tex. 2010). Upon review of the submitted information, we find DART must withhold the information we have marked under section 552.102 of the Government Code.

Section 552.117(a)(2) 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 of the Government Code or section 552.1175 of the Government Code.² Gov't Code § 552.117(a)(2). Therefore, DART must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

Section 552.130 of the Government Code excepts from public disclosure information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state

²"Peace officer" is defined by article 2.12 of the Texas Code of Criminal Procedure.

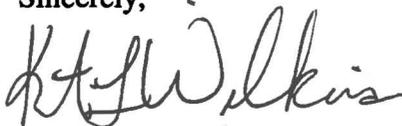
or another state or country. Gov't Code § 552.130(a)(1). We note the submitted information contains driver's license information. Therefore, we find DART must withhold the information we have marked under section 552.130 of the Government Code.

In summary, DART may continue to rely on Open Records Letter No. 2011-12169 with respect to the marked oleoresin capsicum aerosol exam and collapsible baton basic exam questions and answers. With the exception of basic information, which must be released, DART may withhold Exhibits B-1, B-2, B-3, and B-4 under section 552.108 of the Government Code. DART may also withhold the marked test questions and answers under section 552.122 of the Government Code. DART may only release the medical records we have marked in accordance with the MPA. DART must withhold the information we have marked under (1) section 552.101 in conjunction with common-law privacy, (2) section 552.102(a) of the Government Code, (3) section 552.117(a)(2) of the Government Code, and (4) section 552.130 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, 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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/sdk

Ref: ID# 451856

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)