



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 1, 2012

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

OR2012-17495

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# 469722 (DART ORR #9232).

Dallas Area Rapid Transit ("DART") received a request for the investigation materials pertaining to the termination of a named officer, and the training, performance and disciplinary history of the named officer. You state you have released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.122 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, we note Attachment B and a portion of Attachment B-3 are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant 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[.]

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

Gov't Code § 552.022(a)(1). Attachment B is part of a completed investigation and a portion of Attachment B-3, which we have marked, consists of a completed evaluation, both of which are subject to subsection 552.022(a)(1). DART must release Attachment B and the information we have marked in Attachment B-3 pursuant to section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* You seek to withhold Attachment B under section 552.107 and the information we have marked in Attachment B-3 under section 552.122 of the Government Code. However, sections 552.107 and 552.122 are discretionary exceptions and do not make information confidential under the Act. *See Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions).* Therefore, Attachment B may not be withheld under section 552.107 and the evaluation we have marked in Attachment B-3 may not be withheld under section 552.122. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown, 53 S.W.3d 328, 336 (Tex. 2001).* We will therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for Exhibit B. As you raise no further exceptions for the evaluation we have marked in Exhibit B-3, it must be released. However, we will consider your claim under section 552.122 of the Government Code for the remaining information in Exhibit B-3.

Texas Rule of Evidence 503 encompasses 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 state Attachment B contains corrective action/disciplinary action review forms reflecting DART attorneys’ legal review of proposed disciplinary actions against the named officer. You state the submitted information was only communicated between DART attorneys and employees and has remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the submitted information. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding attorney’s entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, DART may withhold Attachment B under rule 503 of the Texas Rules of Evidence.

Section 552.108(a)(1) of the Government Code excepts from disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime if release of the information would interfere with the detection, investigation, or prosecution of crime. Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. *See Open Records Decision Nos. 474 at 4-5 (1987)*. Where a governmental body possesses information relating to a pending case of a law enforcement agency, the governmental body may withhold the information under section 552.108 if (1) it demonstrates the information relates to the pending case and (2) this office is provided with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information.

You state Attachment B-1 relates to a pending criminal investigation by the Irving Police Department. You state, and provide documentation demonstrating, the Irving Police Department objects to release of this information because it would interfere with their

ongoing investigation and any subsequent prosecution. *See Houston Chronicle 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). Accordingly, we find section 552.108(a)(1) is applicable to Attachment B-1.

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). Section 552.108(c) refers to the basic “front-page” information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-187; *see also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Accordingly, with the exception of basic information, DART may withhold Attachment B-1 under section 552.108(a)(1) of the Government Code on behalf of the Irving Police Department.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 of the Government Code encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. ORD 565 at 7. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10–12. Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for criminal justice purposes. *See id.* § 411.089(b)(1). We note section 411.083 does not apply to active warrant information or other information relating to an individual’s current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement in the criminal justice system). Further, CHRI does not include driving record information. *Id.* § 411.082(2)(B). Upon review, we find the information we have marked in Attachment B-2 constitutes confidential CHRI that DART must withhold under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.² However, the remaining information in Attachment B-2 does not constitute CHRI and may not be withheld under section 552.101 of the Government Code on that basis.

²We note an individual may obtain his own CHRI from the Department of Public Safety. *See* Gov’t Code § 411.083(b)(3). As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (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 demonstrated. *Id.* at 681-82. The types of information considered intimate and 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. Upon review, we find none of the remaining information in Attachment B-2 is highly intimate or embarrassing and a matter of no legitimate public concern. Therefore, DART may not withhold any of the remaining information in Attachment B-2 under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy, which 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. The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fadlo v. Coon*, 633 F.2d 1172 (5th 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 (5th 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.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). Upon review, we find no portion of the remaining information in Attachment B-2 falls within the zones of privacy or otherwise implicates an individual’s privacy interests for purposes of constitutional privacy. Therefore, DART may not withhold any of the remaining information in Attachment B-2 under section 552.101 in conjunction with constitutional privacy.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov’t Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d at 710). Section 552.108(b)(1) 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.” *See City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). To demonstrate the applicability of this exception, 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). This office has concluded section 552.108(b)(1) excepts from public disclosure information

relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORD Nos. 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You assert release of the information contained in Attachment B-2 will expose DART police's investigative procedures as a law enforcement agency. Upon review, we find you have not demonstrated release of the remaining information in Attachment B-2 would interfere with law enforcement or crime prevention. Consequently, DART may not withhold any of the remaining information in Attachment B-2 under section 552.108(b)(1).

Section 552.122(b) 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).

You contend the remaining information in Attachment B-3 is excepted from disclosure under section 552.122(b) of the Government Code. You argue release of the Police Training Officer Program Board of Evaluators Questions and the Accutest Identia Training Program Exam would undermine the police officer selection process and compromise the effectiveness of future examinations. Having considered your arguments and reviewed the information at issue, we find the information we have marked qualifies as test items for purposes of section 552.122(b). We also find release of the answers to these questions, which we have marked, would tend to reveal the questions themselves. Therefore, DART may withhold the information we have marked under section 552.122(b) of the Government Code in Attachment B-3. However, the remaining information does not test any specific knowledge of the applicant. We find you have failed to explain how the remaining information in Attachment B-3 constitutes a test item for purposes of section 552.122. Accordingly, we determine the remaining information in Attachment B-3 does not consist of test items under section 552.122(b) and may not be withheld on that basis.

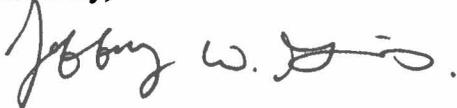
In summary, DART must release the evaluation we have marked in Attachment B-3 pursuant to section 552.022(a)(1) of the Government Code. DART may withhold Attachment B under

Texas Rule of Evidence 503. With the exception of basic information, which must be released, DART may withhold Attachment B-1 under section 552.108(a)(1) of the Government Code. DART must withhold the information we have marked in Attachment B-2 under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. DART may withhold the information we have marked in Attachment B-3 under section 552.122(b) of the Government Code. The remaining information must be released.³

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,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 469722

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the requestor has a special right of access to some of the information being released. Because such information is confidential with respect to the general public, if DART receives another request for this information from a different requestor, DART must again seek a ruling from this office.