



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2012

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

OR2012-17592

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# 471067 (DART ORR #9260).

Dallas Area Rapid Transit ("DART") received a request for a specified internal investigation and a named police officer's training, performance, and disciplinary history. You state DART will release some information to the requestor upon her response to a cost estimate. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2012-02893 (2012). In that ruling, we determined DART may withhold the information we marked under sections 552.117(a)(2) and 552.122(b) of the Government Code and must release the remaining information. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude DART must rely on Open Records Letter No. 2012-02893 as a previous determination and withhold or release the identical information in accordance with that ruling. *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). To the extent the submitted information is not encompassed by the previous ruling, we will consider your arguments against its disclosure.

Section 552.101 of the Government Code exempts 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 the Medical Practice Act (the "MPA"). Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides in 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 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). We also have determined that when a file is created as the result of a hospital stay, all of the documents in the file relating to the diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). Further, medical records must be released on 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. *Id.* §§ 159.004, .005. Any release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). In this instance, the requestor may have a right of access to her client's medical record. *See id.* §§ 159.004, .005. Thus, the medical record we have marked may only be released in accordance with the MPA.

Section 552.101 of the Government Code also encompasses the common-law and constitutional rights of privacy. Common-law privacy 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. The types 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. *See id.* at 683.

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. *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 (1987). 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. *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. 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.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie*, 765 F.2d at 490).

In this instance, the requestor is the attorney for the officer named in the request. As her client's representative, the requestor has a right of access to any of her client's private information that would otherwise be excepted from public disclosure.¹ *See Gov't Code* § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or his authorized representative requests information concerning the individual). Furthermore, we find DART has failed to demonstrate how any of the remaining information at issue is protected by common-law or constitutional privacy. Accordingly, DART may not withhold any of the remaining information at issue under section 552.101 in conjunction with common-law privacy or constitutional privacy.

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 that 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. Whether information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* at 6. 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

¹Section 552.023 provides in part that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." *Gov't Code* § 552.023(a).

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.

You inform us some of the remaining information at issue consists of DART Transit Police Department tests related to racial profiling, defensive tactics, post test grade crossing, collapsible batons, and oleoresin capsicum aerosol. Upon review, we conclude some of the information at issue consists of "test items" for purposes of section 552.122(b). Therefore, you may withhold these questions and their responses, which we have marked, under section 552.122(b). However, we conclude you have not established the remaining information at issue consists of test items for purposes of section 552.122(b). Therefore, you may not withhold the remaining information at issue under section 552.122.

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude DART must rely on Open Records Letter No. 2012-02893 as a previous determination and withhold or release the identical information in accordance with that ruling. DART may only release the marked medical record in accordance with the MPA. DART may withhold the information we have marked under section 552.122(b) of the Government Code. DART must release the remaining information at issue.²

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,



Sean Opperman
Assistant Attorney General
Open Records Division

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²We note the information being released contains confidential information to which the requestor has a right of access. *See* Gov't Code § 552.023(a); ORD 481 at 4. If DART receives another request for this information from a different requestor, then DART should again seek a decision from this office.

Ref: ID# 471067

Enc. Submitted documents

c: Requestor
(w/o enclosures)