



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 8, 2012

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

OR2012-17975

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# 470356 (DART ORR 9248).

Dallas Area Rapid Transit ("DART") received a request for investigations of employees alleged to have violated a specified provision of the DART code of conduct. You state some information has been released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note most of the submitted information consists of a completed investigation subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless it is excepted by section 552.108 of the Government Code or "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(1). Although you raise section 552.103 of the Government Code for this information, this is a discretionary exception to disclosure that may be waived and does not make information confidential under the Act. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 473 (1987) (section 552.103 may be waived). As such, section 552.103 does

not make information confidential for the purposes of section 552.022(a), and the completed investigation at issue may not be withheld on that basis. However, you also raise section 552.101 of the Government Code for this information. In addition, we note portions of this information are subject to sections 552.102, 552.117, 552.1175, and 552.130 of the Government Code.<sup>1</sup> As all of these exceptions make information confidential for purposes of section 552.022, we will address their applicability to the information at issue.

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 the common-law right to privacy, which 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 met. *Id.* at 681-82. Common-law privacy protects the types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). Additionally, 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 Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). However, we note information relating to domestic violence is generally not protected by common-law privacy. *See* Open Records Decision No. 611 at 1-2 (1992) (family violence is a crime, not a private matter). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. DART must withhold the marked information under section 552.101 in conjunction with common-law privacy. However, we find none of the remaining information at issue is private, and it may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses constitutional privacy, which 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. Open Records Decision No. 455 at 4 (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. *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

---

<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. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

concern the “most intimate aspects of human affairs.” *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). We find you have failed to demonstrate how any of the information at issue falls within the zones of privacy or implicates an individual’s privacy interests for purposes of constitutional privacy. Accordingly, DART may not withhold any of the submitted information under section 552.101 on the basis of constitutional privacy.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which pertains to criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Gov’t Code § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI the Texas 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) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. We note section 411.083 does not apply to driving record information. *See id.* § 411.082(2)(B). Upon review, we find none of the submitted information constitutes CHRI for purposes of chapter 411, and it may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to TCLEOSE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides:

(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.

Occ. Code § 1701.454. The submitted information includes F-5 Separation of Licensee forms that were submitted to TCLEOSE pursuant to subchapter J of chapter 1701 of the Occupations Code. In this instance, the submitted F-5 forms do not reflect the officers to whom the forms apply were terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, DART must withhold the F-5 forms, which we have marked, under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

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 has 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). We have marked in the submitted documents and indicated on the submitted video recording the information that must be withheld under section 552.102(a).

Section 552.117 of the Government Code applies to certain personal information when the governmental body holds the information at issue in an employment capacity. Section 552.117(a)(2) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or 552.1175 of the Government Code to keep such information confidential. Gov’t Code § 552.117(a); *see also id.* § 552.024. Section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov’t Code § 552.117 not applicable to numbers for cellular mobile telephones installed in county officials’ and employees’ private vehicles and intended for official business). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We have marked the information that may be subject to this section. However, it is unclear whether all of the current and former DART employees whose information is at issue are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Therefore, if an individual at issue is a currently licensed peace officer, DART must withhold that officer’s information we have marked and indicated under section 552.117(a)(2) of the Government Code. However, DART may withhold the indicated cellular telephone number only if the cellular service is not paid for by a governmental body.

However, if an individual at issue is not a currently licensed peace officer, then that individual’s information may still be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the personal information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code.

*See id.* §§ 552.117, .024. 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 official or 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. Thus, if an individual at issue is not a currently licensed peace officer, but timely requested confidentiality under section 552.024, DART must withhold that individual's information we have marked and indicated under section 552.117(a)(1). Conversely, if an individual is not a currently licensed peace officer and did not make a timely election under section 552.024, DART may not withhold such information under section 552.117(a)(1).

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Gov't Code § 552.1175. Section 552.1175 also encompasses personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure." *Id.* § 552.1175(a)(1). We have indicated the cellular telephone number of a peace officer employed by an agency other than DART that is subject to section 552.1175. If the peace officer elects to restrict access to the information pertaining to him in accordance with section 552.1175(b), and if the cellular service is not paid for by a governmental body, DART must withhold the indicated information under section 552.1175 of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license, title, or registration issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(1)-(2). Therefore, DART must withhold the information we have marked in the submitted documents and indicated on the submitted video recording under section 552.130.

In summary, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the F-5 forms we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. DART must withhold the information we have marked and indicated under section 552.102(a) of the Government Code. If a current or former DART employee whose personal information at issue is a currently licensed peace officer, DART must withhold that officer's information we have marked and indicated under section 552.117(a)(2) of the Government Code. However, DART may withhold the indicated cellular telephone number only if the cellular service is not paid for by a governmental body. If an individual whose personal information is at issue is not a currently licensed peace officer but timely requested confidentiality under section 552.024 of the

Government Code, DART must withhold that individual's information we have marked and indicated under section 552.117(a)(1). If the peace officer employed by an agency other than DART elects to restrict access to the information pertaining to him in accordance with section 552.1175(b) of the Government Code, and if the cellular service at issue is not paid for by a governmental body, DART must withhold the cellular telephone number we have indicated under section 552.1175 of the Government Code. DART must withhold the information we have marked and indicated under section 552.130 of the Government Code. The remaining information must be released to the requestor.

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 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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/som

Ref: ID# 470356

Enc. Submitted documents

c: Requestor  
(w/o enclosures)