ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 21, 2013

Ms. Halfreda Anderson-Nelson
Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2013-10527

Dear Ms. Anderson-Nelson:

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# 490751 (DART ORR# 9793).

Dallas Area Rapid Transit ("DART") received a request for the personnel file of the requestor's client, specified audio and video recordings, a specified investigation, and information regarding disciplinary evaluations, recommendations, and dispositions pertaining to DART police department employees investigated for specified violations of DART's code of conduct and administrative employment manual, including a spreadsheet or document showing the range of disciplinary actions taken.[1] You state DART does not have the requested audio and video recordings or the requested spreadsheet or document showing the range of disciplinary actions taken.[2] You also state DART has released some of the

[1]We note DART asked for and received clarification regarding portions of this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

[2]We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio1978, writ dism'd); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[3]

Initially, we note the information in Attachment C is subject to section 552.022 of the Government Code, which provides in relevant part:

> (a) the following categories of information are public information and not excepted from required disclosure under this chapter unless made confidential under this chapter or other law:
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> > (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). Pursuant to section 552.022(a)(1), a completed report is expressly public unless it is either excepted under 552. 108 of the Government Code or is made confidential under the Act or other law. The information in Attachment C consists of two completed internal affairs investigations made by DART. Thus, Attachment C is expressly public under section 552.022(a)(1). You seek to withhold some of the information at issue under sections 552.107 and 552.111 of the Government Code. However, these sections are discretionary exceptions and do not make information confidential under the Act. *See id.* § 552.007; 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 (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111), 470 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, the information in Attachment C may not be withheld under section 552.107 or section 552.111.

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 the information subject to section 552.022(a)(1). Additionally, because information subject to section 552.022(a)(1) may be withheld under section 552.108, we will consider the applicability of this exception to the information subject to section 552.022(a)(1). Additionally, you claim some of this information is excepted under section 552.101 of the Government Code. We note some of this information

[3]We 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 that those records contain substantially different types of information than that submitted to this office.

is subject to sections 552.117, 552.130, and 552.137 of the Government Code.[4] Sections 552.101, 552.117, 552.130, and 552.137 can make information confidential for purposes of section 552.022(a)(1). Therefore, we will also consider the applicability of these exceptions to the information subject to section 552.022(a)(1), as well as the remaining information.

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 exception encompasses information that other statutes make confidential. You claim section 552.101 in conjunction with the Americans with Disabilities Act of 1990 (the "ADA"). *See* 42 U.S.C. §§ 12101 *et seq.* Title I of the ADA requires information about the medical conditions and medical histories of applicants or employees be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his or her job, is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The federal Equal Employment Opportunity Commission (the "EEOC") has determined medical information for purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Although you contend some of the submitted information is confidential under the ADA, we find you have not demonstrated any of the information falls within the scope of federal law. *See Ballard v. Healthsouth Corp.*, 147 F. Supp.2d 529, 534 (N.D. Tex. 2001) (information not confidential under ADA when not obtained by an employer as a result of job-related medical examination); *Wiggins v. DaVita Tidewater, LLC*, 451 F. Supp.2d 789, 801-02 (E.D. Va. 2006) (information not confidential as medical information under ADA if not obtained as part of employee health program or from medical examinations conducted at employer's direction). We therefore conclude DART may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the ADA.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), which governs access to medical records. Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides:

> (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

[4]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).

> 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.
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> (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. Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. The information we have marked consists of medical records subject to the MPA. DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 159.002 of the Occupations Code. However, none of the remaining information constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Accordingly, DART may not withhold any of the remaining information under section 552.101 in conjunction with the MPA.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation 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). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). DART raises section 552.108(a)(1) for investigation number IA12-10, which pertains to an internal affairs investigation. We note section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (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). However, you explain, and submit a memorandum confirming, investigation number IA12-10 relates to a pending prosecution with the Dallas District Attorney's Office. Based upon this representation, the submitted memorandum, and our review, we conclude release of investigation number IA12-10 would interfere with the detection, investigation, or prosecution of crime. *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).

We note 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 186-88; Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of basic information, DART may withhold investigation number IA12-10, which we have marked, under section 552.108(a)(1) of the Government Code.[5]

Next, we address your claim under section 552.108(b)(2) of the Government Code, which provides in pertinent part:

> (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:
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> . . .
>
> > (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[.]

Gov't Code § 552.108(b)(2). Section 552.108(b)(2) applies only to information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. As previously noted, a governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706. Furthermore, section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See Ellen*, 840 S.W.2d 519, 525-26; *see also* ORD 350 at 3-4. We note the remaining information in Attachment C relates to an administrative investigation concerning two DART employees. You have not explained how this administrative investigation resulted in a *criminal* investigation or prosecution. Therefore, we find you have failed to demonstrate the applicability of section 552.108(b)(2) to this investigation. Accordingly, DART may not withhold any of the remaining information in Attachment C under section 552.108(b)(2) of the Government Code.

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this

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[5]As our ruling on investigation number IA12-10 is dispositive, we need not address your remaining argument against its disclosure.

test must be established. *See 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. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Additionally, this office has also found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, 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), 455 at 9 (employment applicant's salary information not private), 423 at 2 (1984) (scope of public employee privacy is narrow). We also note the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 (1990), 470 at 4 (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (scope of public employee privacy is narrow).

Upon review, we agree that some of the information in Attachment D is highly intimate or embarrassing and not of legitimate public concern. We note, however, the requestor is an attorney representing the individual whose privacy interests are at issue in Attachment D. Thus, this requestor has a special right of access under section 552.023 of the Government Code to information regarding his client that would otherwise be excepted from public disclosure under laws intended to protect privacy interests. *See* Gov't Code § 552.023(b) ("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"). Accordingly, DART may not withhold the information in Attachment D that pertains to the requestor's client under section 552.101 on the basis of common-law privacy.

Upon review, we find the information we have marked, which does not pertain to the requestor's client, 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, DART has failed to demonstrate how any of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, DART may not

withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy, which protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *see also* Open Records Decision Nos. 600 at 3-5, 478 at 4 (1987), 455 at 3-7. The first is the interest in independence in making certain important decisions related to the "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *See Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); *see also* 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 (5thCir.1985); *see also* 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).

As previously noted, the requestor is an attorney representing the individual whose privacy interests are at issue in Attachment D, and, thus, the requestor has a special right of access to his client's information pursuant to section 552.023. *See* Gov't Code § 552.023(b). Thus, DART may not withhold any of the requestor's client's information under section 552.101 in conjunction with constitutional privacy. Further, we find DART has not demonstrated how constitutional privacy applies to any of the remaining information in Attachment C. Accordingly, DART may not withhold any of the remaining information in Attachment C under section 552.101 of the Government Code in conjunction with constitutional 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." Gov't Code § 552.102(a). The Texas Supreme Court 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, 348 (Tex. 2010). Accordingly, DART must withhold the employee birth dates we have marked under section 552.102(a). However, the remaining birth date belongs to the requestor's client. Because section 552.102(a) protects personal privacy, the requestor has a special right of access to his client's birth date under section 552.023. *See* Gov't Code 552.023(a). Thus, DART may not withhold the birth date of the requestor's client from the requestor on the basis of section 552.102(a). Further, we find none of the remaining information is subject to section 552.102(a), and it may not be withheld on that basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a); Open Records Decision No. 622 (1994). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request

for it is made. *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 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. We have marked the personal information of DART employees. If the employees whose personal information is at issue timely elected to keep their information confidential pursuant to section 552.024, DART must withhold the information we have marked under section 552.117(a)(1). DART may not withhold this information under section 552.117(a)(1) if the employees did not timely elect to keep their information confidential pursuant to section 552.024.[6]

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, personal pager and cellular telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code.[7] Gov't Code § 552.117(a)(2). Accordingly, 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 disclosure information that relates to a motor vehicle operator's license or driver's license or a motor vehicle title or registration issued by a Texas agency, or an agency of another state or country. *See id.* § 552.130(a)(1)-(2). Upon review, we find DART must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

We note some of the remaining information consists of personal e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail address at issue is not a type specifically excluded by section 552.137(c). Accordingly, DART must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consent to its disclosure.

In summary, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 159.002 of the Occupations Code. With the exception of basic information, DART may withhold investigation number IA12-10, which we have marked, under section 552.108(a)(1) of the Government Code. DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. DART must withhold the

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[6]Regardless of the applicability of section 552.117 of the Government Code, we note section 552.147(b) of the Government Code permits a governmental body to redact a living person's social security number without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

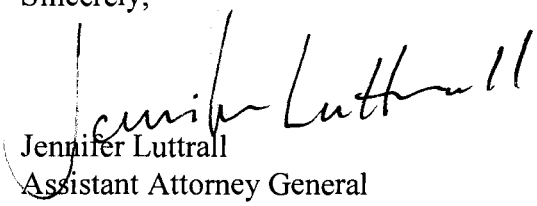
[7]"Peace officer" is defined by article 2.12 of the Texas Code of Criminal Procedure.

information we have marked under section 552.102(a) of the Government Code. If the employees whose personal information is at issue timely elected to keep their information confidential pursuant to section 552.024 of the Government Code, DART must withhold the information we have marked under section 552.117(a)(1) of the Government Code. DART must withhold the information we have marked under sections 552.117(a)(2) and 552.130 of the Government Code. DART must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consent to its disclosure. The remaining information must be released.[8]

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 490751

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[8]We note the information being released in this instance includes information that is confidential with respect to the general public. *See* Gov't Code § 552.023(a), ORD 481 at 4. Therefore, if DART receives another request for this information from a different requestor, DART must again seek a ruling from this office.