



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 10, 2013

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

OR2013-11742

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# 492785 (DART ORR Nos. 9831 and 9847).

Dallas Area Rapid Transit ("DART") received two requests for information from two different requestors. The first requestor seeks job postings during a specified time period, information pertaining to the hiring of a named individual for a specified position, and interview procedures, outcomes, rankings, and hiring practices for DART administrative employees. The second requestor seeks information pertaining to the hiring of a named individual for a specified position, all interview packets and rankings for the specified position, and the officially established policies for hiring of administrative employees. You state DART released some of the information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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.

Initially, we note the first request for information is narrower than the second request for information. Thus, the information pertaining to interview packets and rankings submitted in response to the second request is not responsive to the first request. Accordingly, DART need not release information to the first requestor that is not responsive to his request.

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. You seek to withhold the submitted witness statements under section 552.101 in conjunction with the ruling in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S. Ct. 846 (2009). In *Crawford*, the U.S. Supreme Court held the anti-retaliation provision of section 704(a) of Title VII of the 1964 Civil Rights Act also protects employees who answer questions during an employer’s internal investigation into discrimination, rather than just when employees complain on their own or take part in a formal investigation. *Crawford*, 129 S. Ct. at 849. You contend “this ruling makes clear that the information about who is filing a complaint or participates in an internal investigation under the anti-retaliation provisions are [sic] confidential [.]” Upon review, however, we find the *Crawford* decision did not address the confidentiality of individuals who make complaints. *Id.* at 846. Therefore, because *Crawford* does not make information confidential for purposes of the Act, the submitted information may not be withheld under section 552.101 of the Government Code on that basis.

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). The type 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. *Id.* at 683. We note, however, the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision Nos. 542 (1990), 470 at 4 (1987) (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 or public employees), 432 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find you have not demonstrated how any of the submitted information is highly intimate or embarrassing and not of legitimate public concern. Thus, the submitted information may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the common-law informer’s privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer’s privilege protects from disclosure

the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer's identity. *See* Open Records Decision No. 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton Rev. Ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). However, individuals who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer's privilege. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990). We note the informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. *See* ORD 208 at 1-2.

You state portions of the submitted information should be withheld because they contain the identities and statements of DART employees who participated in an investigation of alleged discrimination in violation of Title VII of the 1964 Civil Rights Act and the Texas Commission of Human Rights Act. We note a witness who provides information in the course of an investigation, but does not make the initial report of a violation, is not an informer for purposes of the common-law informer's privilege. Further, although you inform us the complainant alleged discrimination under federal and state law, you do not inform us, nor does the submitted information reflect, that the alleged violations carry any civil or criminal penalties. Moreover, you have not informed us violations of the alleged laws are within the scope of DART's enforcement authority. Thus, DART may not withhold any portion of the information at issue under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, orig. proceeding); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, orig. proceeding). We determined section 552.111 excepts from disclosure only those internal communications that consist of

advice, opinions, recommendations, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You assert the submitted Hiring Official Training Facilitator's Guide (the "training guide") was implemented by DART's Human Resources Department as a policy on training interview and hiring techniques to DART's hiring officials. You further state release of the training guide provides information on writing technical and behavioral questions, provides hiring legal guidelines, discloses the policy on underutilization, and provides the procedure for resume review. You claim release of the training guide would reveal DART's internal policy for training hiring officials. Based on your representations and our review, we find the submitted training guide constitutes information pertaining to administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* ORD 631 at 3. According, DART may withhold the submitted training guide under section 552.111 of the Government Code.

We note portions of the remaining information may be subject to section 552.117(a)(1) of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to 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 section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request

²The 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.

for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the information we have marked must be withheld under section 552.117(a)(1); however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service. However, DART may not withhold the marked information under section 552.117(a)(1) if the individuals did not make a timely election to keep the information confidential.

Section 552.122 of the Government Code exempts 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); ORD 626 at 8.

You state the remaining information contains the interview guides and score calculation sheets for the position specified in the requests. You assert release of the information at issue would provide an unfair advantage to future applicants, requiring DART to change its interview questions in order to secure the confidentiality of the testing requirements for the position at issue. Based on your representations and our review, we find Question B5 qualifies as a test item under section 552.122(b) of the Government Code. We also find the release of the answers and evaluator comments for Question B5 would tend to reveal the question itself. Accordingly, DART may withhold Question B5 and the corresponding answers and evaluator comments under section 552.122(b) of the Government Code. However, the remaining information evaluates the applicants’ individual abilities, personal opinions, and subjective abilities to respond to particular situations, and it does not test any specific knowledge. Therefore, we conclude DART has not demonstrated the remaining information consists of test items subject to section 552.122(b) of the Government Code, and DART may not withhold it on that basis.

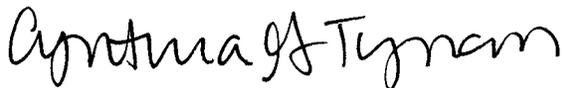
In summary, DART may withhold the submitted training guide under section 552.111 of the Government Code. If the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the information we have marked must be withheld under section 552.117(a)(1) of the Government Code;

however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service. DART may withhold Question B5 and the corresponding answers and evaluator comments under section 552.122(b) of the Government Code. DART must release the remaining information.

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 492785

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)