ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 2, 2013

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

OR2013-13368

Dear Ms. 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# 495208 (DART ORR# 9915).

The Dallas Area Rapid Transit ("DART") received a request for the requestor's complete application packet, including information relating to the requestor's background check. You state DART has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.122 of the Government Code.[1] You also state release of the submitted information may implicate the proprietary interests of Ruiz Protective Service, Inc ("Ruiz"). Accordingly, you state, and provide documentation showing, you notified Ruiz of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why

[1]Although you assert sections 552.101 through 552.131 of the Government Code, you only make arguments for sections 552.101 and 552.122. You make no arguments concerning the remaining exceptions you raise as required by section 552.301 of the Government Code. *See* Gov't Code §§ 552.301(e)(1)(A), .302. Accordingly, this ruling does not address the remaining exceptions you raise.

information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Ruiz explaining why the submitted information should not be released. Therefore, we have no basis to conclude Ruiz has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, DART may not withhold the submitted information on the basis of any proprietary interest Ruiz may have in the 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 section encompasses the doctrine of common-law privacy, which protects information (1) containing 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 satisfied. *Id.* at 681-82. 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. This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note, however, an individual has a special right of access to private information concerning himself. *See* Gov't Code § 552.023(a), (b) (individual has special right of access to information that relates to herself and is protected by laws intended to protect her privacy interests, and governmental body may not deny access on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (privacy theories not implicated when individual requests information concerning herself). Thus, the requestor has a right of access to information pertaining to himself that would otherwise be confidential. Upon review, we conclude the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, you have failed to demonstrate the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the remaining information may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.122 of the Government Code excepts from public 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 state the submitted information contains a writing sample test, which "provides an analytical assessment of applicants by testing the applicant on various scenarios to determine the applicant's thought process." Further, you argue release of the information at issue could compromise DART's application process in the future. Based on your representations and our review, we conclude the information we have marked qualifies as "test items" under section 552.122(b) of the Government Code. We also find the release of the individual's answers to these questions would tend to reveal the questions themselves. Therefore, DART may withhold the questions and answers we have marked under section 552.122(b). However, we find the remaining information does not qualify as "test items" under section 552.122(b). Thus, DART may not withhold the remaining information under section 552.122(b).

In summary, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. DART may withhold the questions and answers we have marked under section 552.122(b) of the Government Code. The remaining information must be released.[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.

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[2]We note the information being released contains partial social security numbers not belonging to the requestor. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b). We also note the requestor has a special right of access to some of the information being released in this instance. *See* Gov't Code § 552.023(a) (governmental body may not deny access to person to whom information relates, or that party's representative, solely on grounds that information is considered confidential by privacy principles). Because such information is confidential with respect to the general public, if DART receives another request for this information from a different requestor, then DART should again seek a ruling from this office.

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,

David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/dls

Ref: ID# 495208

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Andy Ruiz
Ruiz Protective Service, Inc.
2646 Andjon Drive
Dallas, Texas 75220
(w/o enclosures)