



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2013

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

OR2013-17397

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# 501454 (DART ORR Nos. 10073 and 10083).

Dallas Area Rapid Transit ("DART") received two requests from the same requestor for (1) all police reports, internal e-mails, or other documentation related to a specified officer-involved shooting, (2) all surveillance footage or other video related to the shooting, including all surveillance footage at a specified station between 2:00 AM and 5:00 AM on the date of the shooting, (3) all photographs, pictures, or other visual evidence related to the shooting, (4) all internal affairs investigation findings, reports, or other documents related to the specified shooting, (5) all personnel files for two specified DART police officers, (6) all DART police or other police dash camera footage related to the shooting, and (7) any dispatch calls, 9-1-1 calls or other recorded communication made related to the shooting by two specified DART police officers. You state DART has released some of the responsive information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, 552.108, and 552.122 of the Government Code, as well as privileged under rule 503 of the Texas Rules of Evidence. We have considered your arguments and reviewed the submitted representative sample of information.¹

¹We assume that 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.

Initially, you state DART sought clarification with respect to the portion of the request seeking internal e-mails relating to the shooting. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010). You inform us the requestor has not responded to the request for clarification. However, a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8 (1990). In this case, as you have submitted information responsive to this portion of the request for our review and raised exceptions to disclosure for this information, we find DART has made a good-faith effort to identify information that is responsive to this portion of the request, and we will address the applicability of the claimed exceptions to the submitted information. We further determine DART has no obligation at this time to release any additional information that may be responsive to the portion of the request for which DART has not received clarification. However, if the requestor responds to the request for clarification, DART must seek a ruling from this office before withholding any additional responsive information from the requestor. *See City of Dallas*, 304 S.W.3d at 387.

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. Section 552.101 encompasses section 58.007 of the Family Code, which makes confidential juvenile law enforcement records relating to conduct by a child that occurred on or after September 1, 1997. Fam. Code § 58.007(c). The relevant portion of section 58.007 provides:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Id. § 58.007(c). *See also id.* § 51.02(2) (defining "child" as a person who is ten years of age or older and younger than seventeen years of age). You claim the information marked as Attachment B to your submission dated July 31, 2013, and the information in

Attachment B to your submission dated August 2, 2013, are confidential under section 58.007 of the Family Code. We note records of an internal investigation do not constitute juvenile law enforcement records for the purpose of section 58.007(c) of the Family Code. Upon review, we find the information we have marked in Attachment B to your submission dated July 31, 2013 involves delinquent conduct by a child that occurred after September 1, 1997. *See id.* § 51.03 (defining “delinquent conduct” for purposes of section 58.007). Although the juvenile suspect to whom these records relate is deceased, section 58.007 is not solely intended to protect the privacy interests of juveniles. Therefore, the juvenile suspect’s death does not remove information relating to the deceased juvenile from the ambit of section 58.007(c). You do not indicate, nor does it appear, that any of the exceptions in section 58.007 apply. Therefore, the information we have marked is confidential under section 58.007(c) of the Family Code and DART must withhold it under section 552.101 of the Government Code.² However, we find no portion of the remaining information in Attachment B to your submission dated July 31, 2013, and none of the information in Attachment B to your submission dated August 2, 2013, involve delinquent conduct by a child that occurred after September 1, 1997. Therefore, DART may not withhold this information under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See Gov’t Code* § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A). We note section 552.108 is generally not applicable to records of an internal affairs investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *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). You state the remaining information in Attachment B to your submission dated July 31, 2013, as well as the information on the submitted CDs, relate to criminal investigations conducted by DART police and the Dallas Police Department (the “department”) into the actions of the officer in question. You state DART police and the department completed their investigations and the Dallas County District Attorney’s Office declined to prosecute. Thus, you state Attachment B to your submission dated July 31, 2013 relates to a closed case that did not result in conviction or deferred adjudication. Based on these representations and our review, we agree section 552.108(a)(2) is applicable to the remaining information in Attachment B to your submission dated July 31, 2013, as well as the information on the submitted CDs.

²As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

However, 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 Publishing Co. v. City of Houston*, 531 S.W.2d 177, 186-88 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See* Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of the basic information, DART may withhold the remaining information in Attachment B to your submission dated July 31, 2013, as well as the information on the submitted CDs, under section 552.108(a)(2).³

We will next address your arguments for the information in Attachment B-1 to your submission dated July 31, 2013, as well as your remaining arguments for the information submitted in Attachment B to your submission dated August 2, 2013. Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office also has found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Whether the public's interest in obtaining personal financial information is sufficient to justify its disclosure must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). Additionally, this office has found the public has a legitimate interest in information relating to applicants and employees of governmental bodies and their employment qualifications and job performance, especially where the applicant was seeking a position in law enforcement. *See* Open Records Decision Nos. 562 at 10 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 (1986), 423 at 2 (1984) (scope of public employee privacy is narrow).

You assert some of the information in Attachment B-1 to your submission dated July 31, 2013 must be withheld under section 552.101 in conjunction with common-law

³As our ruling is dispositive as to this information, we need not address your remaining argument against its disclosure.

privacy. Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, DART must withhold the information we have marked pursuant to section 552.101 in conjunction with common-law privacy.⁴ We find you have failed to demonstrate that any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Accordingly, DART may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant 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). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. 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. The information you seek to withhold consists of reports of the results of drug tests. We note section 159.001 of the MPA defines “patient” as “a person who, to receive medical care, consults with or is seen by a physician.” *Id.* § 159.001(3). Because the individuals at issue in the reports did not receive medical care in the administration of the drug tests, these individuals are not patients for purposes of section 159.002. Thus, we find you have not demonstrated any of the information at issue consists of a communication between a physician and a patient; records of the identity, diagnosis, evaluation, or treatment of a patient; or information obtained from such communications or records. *See id.* § 159.002(a)-(c). Therefore, DART may not

⁴As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

withhold the any of the information at issue under section 552.101 of the Government Code on the basis of the MPA.

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 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). Upon review, we find DART must withhold the dates of birth we have marked under section 552.102(a) of the Government Code.

You assert that certain information in Attachment B to your submission dated August 2, 2013, consisting of communications involving DART attorneys and employees, as well as a particular claims committee meeting recommendation, is excepted from disclosure under section 552.107 of the Government Code. Section 552.107 protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained.

Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information you seek to withhold in Attachment B to your submission dated August 2, 2013 consists of confidential communications between DART attorneys and employees. You state the information at issue was made for the purpose of providing legal counsel to DART. You further state the communications at issue have been kept confidential. Upon review, we find the attorney-client privilege is applicable to most of the information at issue, which we have marked. Therefore, DART may withhold the information we have marked under section 552.107(1) of the Government Code.⁵ However, we note portions of the information at issue were communicated with individuals whom you have not established are privileged parties. Accordingly, we find you have not demonstrated how the attorney-client privilege is applicable to the remaining information at issue in Attachment B to your submission dated August 2, 2013, and DART may not withhold this information under section 552.107(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.⁶ *See Gov't Code* § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note DART police officers are peace officers as defined by article 2.12 of the Code of Criminal Procedure. Upon review, we find DART must withhold the information we have marked under section 552.117(a)(2) of the Government Code.⁷

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See id.* § 552.130. Accordingly, DART must withhold the

⁵As our ruling is dispositive for this information, we need not address your argument under section 552.111 against its disclosure.

⁶The 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).*

⁷We note a governmental body may withhold a peace officer's home address and telephone number, personal cellular telephone and pager numbers, social security number, and family member information under section 552.117(a)(2) without requesting a decision from this office. *See Open Records Decision No. 670 (2001).*

motor vehicle record information we have marked under section 552.130 of the Government Code.⁸

The remaining documents also include information that is subject to section 552.136 of the Government Code. Section 552.136 provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, DART must withhold the information we have marked under section 552.136 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 we have marked is not excluded by subsection (c). Therefore, DART must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.⁹

In summary, DART must withhold the information we have marked in Attachment B to your submission dated July 31, 2013 under section 552.101 of the Government Code in conjunction section 58.007(c) of the Family Code. With the exception of the basic information, DART may withhold the remaining information in Attachment B to your submission dated July 31, 2013, as well as the information on the submitted CDs, under section 552.108(a)(2). 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 dates of birth we have marked under section 552.102(a) of the Government Code. DART may withhold the information we have marked in Attachment B to your submission dated August 2, 2013 under section 552.107(1). DART must withhold the information we have marked under section 552.117(a)(2) of the Government Code. DART must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. DART must withhold the information we have marked under section 552.136 of the Government Code. DART must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the

⁸We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Act of May 6, 2013, 83rd Leg., R.S., S.B. 458, § 1 (to be codified as an amendment to Gov’t Code § 552.130(c)). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See* Gov’t Code § 552.130(d), (e).

⁹We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion.

owner affirmatively consents to its public disclosure. The remaining information must be released.¹⁰

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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/dls

Ref: ID# 501454

Enc. Submitted documents

c: Requestor
(w/o enclosures)

¹⁰We note the information being released contains the social security numbers of living individuals. 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).