



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 23, 2013

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

OR2013-18398

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# 503220 (DART ORR #10112).

Dallas Area Rapid Transit ("DART") received a request for information pertaining to a specified complaint and the interview rankings and interview comments for the requestor and all other individuals who applied for a specified employment position. You claim the requested 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 information.

Initially, we note Attachment B consists of a completed investigation made by DART that is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under the Act or other law or excepted from disclosure under section 552.108 of the Government Code. *See* Gov't Code § 552.022(a)(1). Although you raise section 552.111 of the Government Code for Attachment B, this section does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, DART may not withhold Attachment B under section 552.111.

However, because section 552.101 of the Government Code makes information confidential under the Act, we will address your arguments under this exception.

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. You seek to withhold under section 552.101 in conjunction with the holding in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 555 U.S. 271 (2009), the identities and statements of DART employees who participated in an investigation of discrimination conducted by DART. In *Crawford*, the United States Supreme Court held the anti-retaliation provision of section 704(a) of Title VII of the Civil Rights Act of 1964 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*, 555 U.S. at 273. You contend “this ruling clearly states 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 does not address the confidentiality of the identity of an individual who makes a complaint or participates in an internal investigation. *Id.* Therefore, because *Crawford* does not make information confidential for purposes of the Act, DART may not withhold any of the submitted information under section 552.101 of the Government Code on that basis.

You also seek to withhold the identities and statements of DART employees who participated in an investigation of discrimination conducted by DART under section 552.101 of the Government Code in conjunction with the holding in *Montgomery County v. Park*, 246 S.W.3d 610 (Tex. 2007). In *Montgomery*, the Texas Supreme Court adopted, with modifications, the United States Supreme Court’s test for a violation of the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964 to determine what constitutes “adverse personnel action” under the Texas Whistleblower Act, chapter 554 of the Government Code. *Id.* at 614. The court held that for a personnel action to be adverse within the meaning of the Whistleblower Act it must be material, and, thus, likely to deter a reasonable, similarly situated worker from reporting a violation of the law. *Id.* at 612. You assert “release of the employee’s [sic] identities and statements concerning DART’s internal investigation would discourage employees from cooperating with a future DART internal investigation.” Thus, we understand you to assert the court’s holding in *Montgomery* makes the identities and statements of the employees who participated in the internal investigation confidential. Upon review, however, we find the *Montgomery* decision does not address the confidentiality of information that identifies an individual who makes a complaint or participates in an internal investigation. *Id.* Therefore, because *Montgomery* does not make information confidential for purposes of the Act, DART may not withhold any of the submitted information 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 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. The types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987).

Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. DART has failed to demonstrate, however, how 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 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 remaining information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

We note portions of the remaining information may be subject to section 552.117(a)(1) of the Government Code.<sup>1</sup> 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). 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). 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 individual 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, DART may not withhold the marked information under section 552.117(a)(1) if the individual did not make a timely election to keep the information confidential.

Section 552.122 of the Government Code excepts 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 Attachment C contains the candidate summary, interview guide, and selection form for the position of supervisor customer care. You assert release of Attachment C would provide an unfair advantage to future applicants for this position, impair DART's ability to evaluate qualified candidates for this position, and require DART to change its interview

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470.

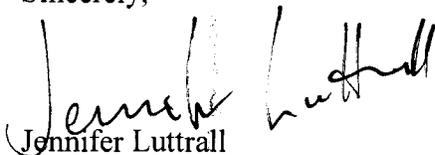
questions and score criteria to secure the confidentiality of the interview process for this position. Upon review of your arguments and the information at issue, we find the information submitted as Attachment C evaluates the applicants' individual abilities, personal opinions, and subjective abilities to respond to particular situations, and it does not test any specific knowledge. Therefore, we conclude DART has not demonstrated Attachment C 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 must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the individual 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. 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](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# 503220

Enc. Submitted documents

c: Requestor  
(w/o enclosures)