



May 20, 2002

Mr. Roland Castañeda
General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2002-2665

Dear Mr. Castañeda:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163137.

Dallas Area Rapid Transit ("DART") received a request for copies of the results of a psychological evaluation of a specified DART applicant, as well as copies of DART police department disqualification factors. You claim that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.102, and 552.122 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by an interested third party. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

You claim that Attachment B is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.¹ Chapter 611 provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) provides:

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See* Health and Safety Code § 611.001. Sections 611.004 and 611.0045 provide for access to mental health records only for certain individuals. *See* Open Records Decision No. 565 (1990). We agree that a portion of Attachment B is a mental health record subject to chapter 611. Accordingly, we conclude that DART may only disclose the marked mental health record in Attachment B as provided by the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code. However, we do not agree that the last page of Attachment B constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient. Consequently, we conclude that DART must release this page to the requestor.

You also claim that Attachment C is excepted from disclosure pursuant to section 552.122(b) of the Government Code. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. *See* Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that 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. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. *See* Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *See id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Based on our review of your arguments and Attachment C, we find that no portion of this information constitutes "test items" as contemplated by section 552.122(b). Accordingly, we conclude that DART may not withhold any portion of Attachment C pursuant to section 552.122 of the Government Code.

You also claim, however, that Attachment C is excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 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). However, section 552.102 only protects information in a personnel file of an employee of a governmental body, not information relating to an applicant for employment with the governmental body. Accordingly, we conclude that DART may not withhold any portion of Attachment C from disclosure pursuant to section 552.102 of the Government Code.

You also claim that Attachment C is excepted from disclosure pursuant to section 552.101 in conjunction with the constitutional and common-law rights to privacy. Section 552.101

also encompasses information protected from disclosure by the common-law right to privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and 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.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Open Records Decision No. 455 at 4 (1987)*. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *See id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

Based on our review of your arguments and Attachment C, we find that no portion of that information is confidential under either the constitutional or common-law rights to privacy. Accordingly, we conclude that DART may not withhold any portion of Attachment C from disclosure pursuant to section 552.101 of the Government Code in conjunction with the constitutional or common-law rights to privacy. Consequently, we conclude that DART must release Attachment C to the requestor in its entirety.

In summary, DART may only disclose the marked mental health record in Attachment B as provided by the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code. DART must release the remaining information to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

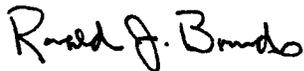
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 163137

Enc. Marked documents

cc: Mr. E. J. Jaxon
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(w/o enclosures)