



ATTORNEY GENERAL OF TEXAS
G R E G A B B O T T

July 18, 2005

Mr. Swanson W. Angle
General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2005-06345

Dear Mr. Angle:

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# 228249

Dallas Area Rapid Transit ("DART") received a request for information pertaining to six named DART employees. You state that DART has made available responsive material but claim that the submitted information, Exhibit B, is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Initially, we note that chapter 552 of the Government Code does not require DART to release information that did not exist when it received this request or to create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). In this instance, a portion of the submitted information was created after the date of DART's receipt of this request for information and thus is not responsive to this request. This decision does not address the public availability of the non-responsive information, and that information need not be released. We have marked this information accordingly.

Next, you indicate that DART submitted a prior request for an opinion to this office "concerning another party's request for substantially similar information." *See Open*

Records Letter No. 2005-04128 (2005). You also state that this request “pertains to the identical subject matter and set of facts.” To the extent that the present request seeks records that were at issue in Open Records Letter No. 2005-04128, DART must comply with our prior ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (criteria of previous determination regarding specific information previously ruled on). To the extent the remaining submitted information is not subject to our prior ruling, we address the submitted arguments.

We note the submitted information contains mental health records subject section 611.002 of the Health and Safety Code. This section provides in part:

- (a) 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.
- (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). 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 id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, 611.0045; Open Records Decision No. 565 (1990). We have marked the information that is confidential under section 611.002 and may not be released except in accordance with section 611.004 and 611.0045 of the Health and Safety Code.

Because your claim regarding section 552.108 is the broadest, we will consider it next. Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). This exception is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature. *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 Gov’t Code § 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution).

In this instance, the submitted information consists of records of an internal affairs investigation. You explain that “DART Police Internal Affairs office is tasked with the primary responsibility of investigating crimes.” You inform us that the submitted information is related to an ongoing criminal investigation and that the release of this information would interfere with the investigation and detection of crime. Based on your representations and our review of the remaining submitted information, we find that the release of this information would interfere with the detection, or investigation of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). We therefore conclude that DART may withhold the remaining submitted information under section 552.108(a)(1).

In summary, to the extent that the present request seeks records that were at issue in Open Records Letter No. 2005-04128, DART must comply with our prior ruling. DART must withhold the marked information that is confidential under section 611.002 of the Health and Safety Code, unless the requestor has a right of access to the information under sections 611.004 and 611.0045 of the Health and Safety Code. The remaining submitted information in Exhibit B may be withheld pursuant to section 552.108(a)(1).¹

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the

¹As our ruling on this issue is dispositive, we need not address your remaining arguments against disclosure.

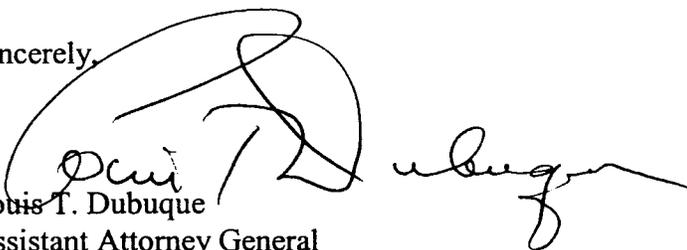
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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); *Tex. Dep't of Pub. 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,



Lotis T. Dubuque
Assistant Attorney General
Open Records Division

LTD/seg

Ref: ID# 228249

Enc. Submitted documents

c: Mr. Todd Bensman
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(w/o enclosures)