



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 4, 2009

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

OR2009-02793

Dear Mr. Simmons:

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# 336289.

The Dallas Area Rapid Transit ("DART") received a request for information related to administrative reviews, internal affairs investigations, and complaints generated by a named DART employee. You state DART has released some responsive information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.108, 552.111, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information is subject to section 552.022 of the Government Code, which provides in relevant part:

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information consists of completed investigations made by DART, which are expressly public under section 552.022(a)(1). While you claim some of the submitted information is excepted from disclosure under 552.111 of the Government Code, we note this section is a discretionary exception to disclosure that protects a governmental body's interest and may be waived. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (governmental body may waive section 552.111). As such, section 552.111 is not other law that makes information confidential for the purposes of section 552.022. Therefore, DART may not withhold any portion of the submitted information under section 552.111. However, because information that is subject to section 552.022(a)(1) may be withheld under section 552.108 and mandatory exceptions, we will consider DART's claims under sections 552.101, 552.108, 552.117, and 552.130 of the Government Code.

Section 552.101 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 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 the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *See* Open Records Decision Nos. 515 at 3 (1998), 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." *See* Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (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 4-5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 at 5 (1990).

You claim the witness names and statements contained in Attachments B and C must be withheld under the informer's privilege. You state the witnesses reported a possible violation of Equal Employment Opportunity ("EEO") law to DART's Director of Diversity and EEO. However, you have not explained how a violation of EEO law could result in the imposition of a civil or criminal penalty by DART. Accordingly, you have not demonstrated the informer's privilege is applicable to any portion of the information at issue. Thus, we conclude DART may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the informer's privilege.

Section 552.101 also encompasses the doctrine of common-law privacy, which 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* at 683. In addition, this office has found that personal financial information not relating to the 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). Generally, however, the public has a legitimate interest in information that relates to public employment and public employees, and information that pertains to an employee's actions as a public servant generally cannot be considered beyond the realm of legitimate public interest. See Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs; but in fact touches on matters of legitimate public concern); 542 (1990); 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees); 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we determine the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, DART must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, we determine that no portion of the remaining information is highly intimate or embarrassing. Therefore, none of the remaining information may be withheld under section 552.101 on the basis of common-law privacy.

Next, we address your claim under section 552.108 of the Government Code, which provides in pertinent part:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(b)(2). Section 552.108(b)(2) applies only to information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. See *id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

The submitted information relates to internal affairs investigations concerning the named employee. We note section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See 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); *see also* Open Records Decision No. 350 at 3-4 (1982). We find you have failed to demonstrate how these internal affairs investigations resulted in *criminal* investigations or prosecutions. We therefore conclude DART may not withhold any of the submitted information under section 552.108 of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information pertaining to a peace officer, regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential.¹ Gov't Code § 552.117(a)(2). You state the named officer is a current employee of DART. Therefore, DART must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

Finally, we address your claim under section 552.130 of the Government Code. Section 552.130 excepts from disclosure “information [that] relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state[.]” *Id.* § 552.130. Accordingly, DART must withhold the Texas driver’s license numbers and motor vehicle record information we have marked pursuant to section 552.130 of the Government Code.

In summary, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, the information we have marked under section 552.117(a)(2) of the Government Code, and the information we have marked under section 552.130 of the Government Code. The remaining information must be released.

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.oag.state.tx.us/open/index_orl.php, 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

¹“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink that reads "Jordan Hale". The signature is written in a cursive style with a large, looping initial "J".

Jordan Hale
Assistant Attorney General
Open Records Division

JH/eb

Ref: ID# 336289

Enc. Submitted documents

cc: Requestor
(w/o enclosures)