



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

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Mr. Hyattye O. Simmons  
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OR2009-02864

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# 336291 (ORR # 6205).

The Dallas Area Rapid Transit (the "DART") received a request for information related to administrative reviews, internal affairs investigations, and specific complaints generated by or against a named DART employee over a particular time period. You state the DART has released some responsive information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 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 portions of the submitted information are 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). Portions of the submitted information consist of completed investigations and reports made by the DART, which are expressly public under section 552.022(a)(1). While you claim some of the information subject to section 552.022

is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, we note these sections are discretionary exceptions to disclosure that may be waived by a governmental body. *See id.* § 552.007; Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.107 and 552.111 do not make information confidential for purposes of section 552.022. Therefore, the DART may not withhold any portion of the information subject to section 552.022 under section 552.107 or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is also found under rule 503 of the Texas Rules of Evidence, and the attorney work product privilege is also found at rule 192.5 of the Texas Rules of Civil Procedure. Accordingly, we will consider your assertions of these privileges under rule 503 and rule 192.5 for the information subject to section 552.022. Furthermore, because information subject to section 552.022(a)(1) may be withheld under sections 552.101, 552.108, 552.117, and 552.130, we will consider your arguments under these exceptions.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if 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). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state pages 97 and 164 in Attachment D consist of communications between the DART’s Senior Assistant General Counsel and the DART police department regarding two internal investigations pertaining to the named employee. You also state these communications were made for the purpose of facilitating the rendition of professional legal services to the DART, were made in confidence, and that confidentiality has been maintained. Based on your representations and our review, we agree that pages 97 and 164 constitute privileged attorney-client communications. Therefore, the DART may withhold pages 97 and 164 under Texas Rule of Evidence 503.<sup>1</sup>

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses confidentiality provisions such as Family Code section 58.007. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. Fam. Code § 51.03. The relevant language of section 58.007(c) reads as follows:

(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;

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<sup>1</sup>As our ruling is dispositive, we need not address your argument under rule 192.5 of the Texas Rules of Civil Procedure against the disclosure of this information.

(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 Subchapter B.

*Id.* § 58.007(c). You claim that pages 1-6, 31, 32, 69-85 and 90-92 in Attachment D are subject to section 58.007. Upon review, we find pages 90 through 95 in Attachment D concern juvenile delinquent conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, pages 90 through 95 are confidential pursuant to section 58.007(c) of the Family Code. The DART must withhold pages 90 through 95 from disclosure under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. However, pages 1-6, 31, 32, and 69-85 do not constitute juvenile law enforcement records for purposes of section 58.007, and the DART may not withhold those pages under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses section 261.201(a) of the Family Code, which provides as follows:

<sup>2</sup>The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

*Id.* § 261.201(a). Upon review of the remaining information, we find that pages 10 through 13 in Attachment D consist of files, reports, records, communications, audiotapes, videotapes, or working papers used or developed in an investigation conducted by the DART police department of alleged or suspected child abuse or neglect under chapter 261 of the Family Code. *See id.* § 261.001 (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining “child” for purposes of this section

as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). You have not indicated that the DART police department has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, pages 10 through 13 in Attachment D are confidential pursuant to section 261.201 of the Family Code and must be withheld under section 552.101 of the Government Code.<sup>2</sup>

Section 552.101 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 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. 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 the 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 the DART. Accordingly, you have not demonstrated the informer's privilege is applicable to any portion of the information at issue. Thus, we conclude the 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 also found that common-law privacy applies

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<sup>2</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against disclosure.

to the identifying information of juvenile offenders. *See* Open Records Decision No. 384 (1983); *cf.* Fam. Code § 58.007.

We note that the remaining information contains the identifying information of juvenile offenders. Therefore, the DART must withhold the juvenile offenders' identifying information, which we have marked, in Attachment D under section 552.101 of the Government Code in conjunction with common-law privacy.

You claim that the remaining information is subject to common-law privacy. 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). Thus, because the remaining information pertains to public employment and public employees' actions, there is a legitimate public interest in this information. Therefore, the DART may not withhold any of the remaining information 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).

Portions of the remaining information relate 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). You have not explained how the submitted internal affairs investigations resulted in *criminal* investigations or prosecutions. Therefore, we find you have failed to demonstrate the applicability of section 552.108(b)(2) to these investigations. Accordingly, the DART may not withhold the submitted internal affairs investigations under section 552.108 of the Government Code.

You assert that the remaining information “may contain information that [is] related to the home address, home telephone number [,] or social security [number,] and family members of” the named employee. Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses, telephone numbers, social security numbers, and family member information of current or former employees of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). We note, however, that the remaining documents do not contain the personal information of any DART employees. Thus, section 552.117 is inapplicable in this instance. Accordingly, the DART may not withhold any of the remaining information under section 552.117(a)(1) of the Government Code.

Section 552.130 of the Government Code 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, the 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.

We note that some of the remaining information contains personal e-mail addresses that are subject to section 552.137 of the Government Code.<sup>3</sup> 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 addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the DART must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the DART may withhold pages 97 and 164 in Attachment D pursuant to rule 503 of the Texas Rules of Evidence. The DART must withhold pages 90 through 95 in Attachment D under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code, and pages 10 through 13 in Attachment D under section 552.101 in conjunction with 261.201 of the Family Code. The DART must withhold the marked identifying information of juvenile offenders in Attachment D under section 552.101 in conjunction with common-law privacy. The DART must withhold the Texas driver's license numbers and motor vehicle record information we have marked in Attachment D pursuant to section 552.130 of the Government Code. Unless the owners of the marked e-mail addresses have affirmatively consented to their disclosure, the DART must withhold the e-mail addresses under section 552.137 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](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 information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/eeg

Ref: ID# 336291

Enc. Submitted documents

c: Requestor  
(w/o enclosures)