



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 13, 2009

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

OR2009-09579

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# 348917.

Dallas Area Rapid Transit ("DART") received a request for all personnel records regarding a named individual. You claim the submitted personnel records are excepted from disclosure under sections 552.101, 552.103, 552.130, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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

(a) Without limiting the amount or kind of information that is public information under this chapter, 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:

¹We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

(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 contains completed performance evaluations and completed employment background reports. Pursuant to section 552.022(a)(1) of the Government Code, completed evaluations and reports are expressly public unless they are excepted under section 552.108 of the Government Code or are expressly confidential under other law. You claim the submitted evaluations and reports are excepted under sections 552.101 and 552.103 of the Government Code. Section 552.103 is a discretionary exception that protects a governmental body's interest and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, it is not other law that makes information confidential for the purposes of section 552.022. Consequently, the completed evaluations and reports, which we have marked, may not be withheld under section 552.103 of the Government Code. However, because information subject to section 552.022(a)(1) may be withheld under section 552.101, we will consider your arguments for this exception with respect to the evaluations and reports subject to section 552.022, along with your arguments for the information that is not subject to section 552.022.

You claim the information not subject to section 552.022 is excepted under section 552.103, which provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103 exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard*

v. Houston Post Co., 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). Furthermore, this office has stated that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You state that, prior to DART's receipt of this request, the named individual whose personnel records are at issue filed a claim of discrimination with the EEOC. You also state, and provide documentation showing, that prior to receiving the request, DART received a letter from the individual's attorney alleging certain civil rights violations and demanding specific remedies for those violations. Based on your representations and our review, we determine DART reasonably anticipated litigation on the date it received the request. Further, you explain the submitted memoranda, e-mails, and general personnel records relate to the basis of the anticipated litigation. Thus, we agree the submitted information relates to the reasonably anticipated litigation.

We note, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the potential opposing party in the anticipated litigation is not excepted from disclosure under section 552.103, and it must be disclosed. In this instance, the potential opposing party to the anticipated litigation has already seen some of the submitted information. Therefore, that information may not be withheld under section 552.103. However, the remaining information at issue, which we have marked, may be withheld under section 552.103 of the Government Code. We note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim the remaining information not subject section 552.022 that is not already marked under section 552.103 is excepted under section 552.103 based on a separate claim of anticipated litigation. You state the requestor filed an internal discrimination complaint with DART against the named individual whose information is at issue. Based on that complaint, you contend DART reasonably anticipates litigation involving the requestor. We note, however, that a threat to sue, or a perceived threat to sue, without any further action is not sufficient to establish reasonably anticipated litigation. *See* ORD 331. In this instance, you have not informed us the requestor has taken any concrete steps toward the initiation of litigation. *See id.* Additionally, a request for information by a potential opposing party or that party's attorney is not by itself enough to establish reasonably anticipated litigation. *See* ORD 361. Consequently, after reviewing your arguments, we find you have not established that DART reasonably anticipated litigation regarding the requestor when it received the request for information. Accordingly, DART may not withhold any of the remaining information under section 552.103 of the Government Code.

We will now address your claims for the remaining information, which consists of the information subject to section 552.022 and the information that may not be withheld under section 552.103. 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. This exception encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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 established. *Id.* at 681-82. You claim the remaining information is protected in its entirety by common-law privacy because it relates to the named individual's discrimination complaint and other employment matters. Although the information may be intimate or embarrassing, this office has found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, the remaining information may not be withheld in its entirety under common-law privacy.

However, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Furthermore, this office has found some kinds of medical information or information

indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked medical information and personal financial information in the remaining information that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

The remaining information contains I-9 forms. Section 552.101 also encompasses section 1324a of title 8 of the United States Code, which provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the submitted I-9 forms under the Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we find that the I-9 forms we have marked are confidential under section 552.101 of the Government Code, and may only be released in compliance with the federal laws and regulations governing the employment verification system.

The remaining information contains tax return information. Section 552.101 also encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of . . . income, payments, . . . tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or . . . the determination of the existence, or possible existence, of liability . . . for any tax, penalty, . . . or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). DART must withhold the W-4 forms we have marked pursuant to federal law.

The remaining information contains a Texas driver's license number. Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). Thus, DART must withhold the Texas driver's license number we have marked in the remaining documents under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Id. § 552.136. Although you assert the remaining information contains insurance policy numbers that are excepted under section 552.136, we have not found, nor have you indicated in the documents, any such information. Thus, none of the remaining information may be withheld under section 552.136 of the Government Code.

The remaining information includes e-mail addresses subject to section 552.137 of the Government Code, which 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). *Id.* § 552.137(a)-(c). The e-mail addresses in the remaining information are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137, unless the owner of the addresses has affirmatively consented to their release. *See id.* § 552.137(b).

Finally, we note some of the remaining information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether 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). DART may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You have not informed us whether or not the named employee whose information is at issue chose to withhold her personal information prior to DART's receipt of the request for information. Therefore, if the employee timely elected to withhold her home addresses, home telephone numbers, social security number, and family member information, DART

must withhold this information, which we have marked, pursuant to section 552.117(a)(1) of the Government Code. If the employee did not timely elect to withhold her personal information, then DART may not withhold any of the marked personal information under section 552.117(a)(1) of the Government Code.

In summary, DART may withhold the marked information under section 552.103 of the Government Code. DART must withhold the marked medical and personal financial information under section 552.101 in conjunction with common-law privacy; the marked W-4 forms pursuant to section 552.101 of the Government Code in conjunction with federal law; the marked driver's license number under section 552.130 of the Government Code; and the marked e-mail addresses under section 552.137 of the Government Code, unless the owner of the addresses has affirmatively consented to their release. The marked I-9 forms are confidential under section 552.101 of the Government Code, and may only be released in compliance with the federal laws and regulations governing the employment verification system. If the employee whose information is at issue timely elected to withhold her personal information, DART must withhold the marked home addresses, home telephone numbers, social security number, and family member information pursuant to section 552.117(a)(1) of the Government Code. If the employee did not timely elect to withhold her personal information, then DART may not withhold any of the marked personal information under section 552.117(a)(1) 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 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/dls

Ref: ID# 348917

Enc. Submitted documents

c: Requestor
(w/o enclosures)