



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2010

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

OR2010-19326

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# 402234 (DART ORR# 7713).

Dallas Area Rapid Transit ("DART") received a request for specified information related to complaints and discipline taken by DART, including investigations related to three named officers. You state DART released or has made available some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.108 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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. We also note the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

Most of the information in Attachment B was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-14649 (2010). In addition, the information in Attachment B-3 was the subject of a previous request for information, in response to which this office issued Open Record Letter No. 2010-03414. In those rulings, we determined DART must withhold portions of the information at issue under section 552.101 of the Government Code in conjunction with various confidentiality statutes and common-law and constitutional privacy, as well as sections 552.108(a)(1), 552.117(a)(2), 552.130, and 552.137 of the Government Code, and that DART must release the remaining information at issue. The law regarding some of the information at issue in these rulings has changed. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Specifically, section 552.102 of the Government Code is now applicable to some of the information subject to these rulings, which we have marked.² *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010) (Dec. 20, 2010, motions for reconsideration and rehearing pending). Accordingly, DART may not continue to rely on Open Records Letter No. 2010-14649 or 2010-03414 as a previous determination with respect to the information we have marked in Attachments B and B-3 that is subject to section 552.102. However, in regard to the remaining information at issue, we have no indication that there has been any change in the law, facts, and circumstances on which the remaining determinations in these prior rulings were based; therefore, DART must continue to rely on Open Records Letter Nos. 2010-14649 and 2010-03414 as previous determinations for the remaining information at issue and withhold or release that information in accordance with those rulings. *See* ORD 673.

The submitted information that is not subject to the previous determinations discussed above consists of completed investigations. Under section 552.022(a)(1) of the Government Code, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Although you assert this information is excepted under sections 552.103 and 55.107 of the Government Code, these sections are discretionary exceptions under the Act and do not constitute "other law" for purposes of section 552.022. *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); Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, DART may not withhold the remaining

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body.

information under section 552.103 or 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that makes information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Sections 552.101, 552.102, 552.117, 552.130, and 552.137 of the Government Code also constitute other law for purposes of section 552.022.³ We will, therefore, consider whether the remaining information is excepted under section 552.101, 552.102, 552.117, 552.130, or 552.137, or Texas Rule of Evidence 503. We also will consider your argument under section 552.108.

Section 552.102(a) of the Government Code 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). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010) (Dec. 20, 2010, motions for reconsideration and rehearing pending). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

You assert Exhibit B-1 is privileged under Texas Rule of Evidence 503. Rule 503(b)(1) provides the following:

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

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. See Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); see, e.g., Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

(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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (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. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

You explain Exhibit B-4 constitutes confidential communications between an attorney and employee of DART that were made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and their confidentiality has been maintained. After reviewing your arguments and the submitted information, we agree Exhibit B-4 constitutes privileged attorney-client communications that DART may withhold under Texas Rule of Evidence 503.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes, including the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, 159.004; Open Records Decision No. 598 (1991). Medical records must be released upon the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, 159.005. Section 159.002(c) also requires any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the portion of the remaining information that constitutes medical records and that DART may only release in accordance with the MPA.

The remaining information contains records that are subject to Chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) states "[c]ommunications 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." 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. Health & Safety Code § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the information that constitutes mental health records; thus, DART may only release this information in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (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). The types 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. This office has found the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). However, this office has stated in numerous decisions that information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, is generally not

protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we find some of the remaining information is intimate or embarrassing and is not of legitimate concern to the public; therefore, DART must withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy. The remaining information, however, either is not highly intimate or embarrassing, or it is of legitimate public interest; therefore, the remaining information is not confidential under common-law privacy, and DART may not withhold it on that ground.

You assert some of the remaining information is excepted under section 552.108 of the Government Code. Section 552.108(b)(1) excepts from disclosure "[a]n 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 . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]" This section is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded that this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed guidelines regarding police department's use of force policy), 508 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). To claim this aspect of section 552.108 protection, however, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common-law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

You assert release of the remaining information related to police recruit training manuals and daily observation sheets of a DART officer would interfere with law enforcement. You argue the training manuals contain "police sensitive and tactical information regarding DART Police Training[.]" You also argue release of the information in the officer's performance evaluations "would interfere and negatively affect her law enforcement position and risk her safety as an officer." However, after review of your arguments and the information at issue, we find you have not established how public access to the police recruit training manuals at issue and daily observation sheets would interfere with law enforcement or endanger DART officers. Accordingly, DART may not withhold this information under section 552.108(b)(1) of the Government Code.

Section 552.117(a)(1) of the Government Code 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. Whether a particular piece of 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). Section 552.117(a)(2) of the Government Code excepts from disclosure this same information regarding a peace officer, as defined by article 2.12 of the Texas Code of Criminal Procedure, regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential. Section 552.117 of the Government Code also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (Government Code section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). But an individual's personal post office box number is not a "home address" for purposes of section 552.117, and therefore may not be withheld under section 552.117. *See* Open Records Decision No. 622 at 4 (1994) (purpose of section 552.117 is to protect public employees from being harassed at home); *see also* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied).

We have marked the information of police officers that DART must withhold under section 552.117(a)(2); however, DART may only withhold the marked cellular telephone numbers of officers if the officers themselves paid for the cellular telephone service.⁴ DART must also withhold the information we have marked under section 552.117(a)(1) if the employees at issue elected to keep such information confidential prior to DART's receipt of the request for information.

⁴We note a government body may withhold a peace officer's home address and telephone number, personal cellular telephone and pager numbers, social security number, and family member information under section 552.117(a)(2) without requesting a decision from this office. *See* Open Records Decision No. 670 (2001); Gov't Code § 552.147(b).

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). DART must withhold the Texas motor vehicle record information we have marked under section 552.130.

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). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the remaining materials. Therefore, DART must withhold the e-mail addresses we have marked under section 552.137.

Finally, we note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

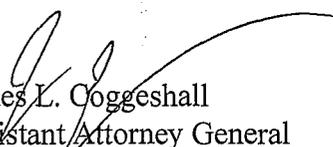
To conclude, with the exception of the information we have marked under section 552.102 of the Government Code, DART must withhold or release the remaining information at issue in Exhibit B and Exhibit B-3 in accordance with Open Records Letter Nos. 2010-14649 and 2010-03414. DART must withhold the information we have marked under section 552.102(a) of the Government Code. DART may withhold Exhibit B-4 under Texas Rule of Evidence 503. DART may only release the marked medical records in accordance with the MPA and the marked mental health records in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. DART must withhold the following: (1) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the information we have marked under section 552.117(a)(2) of the Government Code, but DART may only withhold the marked cellular telephone numbers of officers if the officers themselves paid for the cellular telephone service; (3) the information we have marked under section 552.117(a)(1) of the Government Code if the employees at issue timely elected to withhold that information; and (4) the information we

have marked under sections 552.130 and 552.137 of the Government Code.⁵ DART must release the remaining information, but DART may only release any copyrighted information in accordance with copyright law.

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, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tf

Ref: ID# 402234

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver' license and Texas license plate numbers under section 552.130 of the Government Code and an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general opinion.