ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 23, 2011

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

OR2011-07257

Dear Ms. 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# 418390.

Dallas Area Rapid Transit ("DART") received a request for the original employment applications and all promotions of one named individual and the employment history and all employment applications of a second named individual. You state you have released some of the requested information. We note you have redacted social security numbers pursuant to section 552.147(b) of the Government Code, employee information pursuant to section 552.024(c) of the Government Code, and an e-mail address under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).[1] You claim the submitted information is excepted from disclosure under sections 552.101 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

[1]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. *See* Gov't Code § 552.147(b). Section 552.024 of the Government Code authorizes a governmental body to redact from public release a current or former official's or employee's home address, home telephone number, social security number, and information that reveals whether the person has family members without the necessity of requesting a decision from this office under the Act, if the employee or official timely elected to withhold such information. *Id.* § 552.024(a)-(c). Open Records Decision No. 684 is a previous determination issued by this office to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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. Section 552.101 encompasses information that other statutes make confidential, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part the following:

> (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (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.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We find the information we have marked in Exhibit B constitutes confidential medical records that may only be released in accordance with the MPA. However, we find none of the remaining information in Exhibit B constitutes a medical record for purposes of the MPA. Accordingly, DART may not withhold any of the remaining information under section 552.101 on that ground.

Section 552.101 also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (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. *See id.* at 683. 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). In addition, a compilation

of an individual's criminal history record information is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). This office has also found that information pertaining to certain personal financial decisions is 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). Upon review, we find the information we have marked in Exhibit B is highly intimate or embarrassing and not of legitimate public concern. Therefore, DART must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, none of the remaining information is highly intimate or embarrassing, or it is of legitimate public interest, and DART may not withhold it under section 552.101 on the basis of common-law privacy.

You also assert the remaining information in Exhibit B is protected under constitutional privacy, which is also encompassed by section 552.101 of the Government Code. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently, and (2) an individual's interest in avoiding disclosure of personal matters. ORD 455 at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find no portion of the remaining information falls within the zones of privacy or otherwise implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, DART may

not withhold any of the remaining information in Exhibit B under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[2] 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.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the remaining information, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the 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. Gov't Code § 552.117(a)(1). 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). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. We have marked the personal information of a DART employee. If the employee whose personal information is at issue made a timely election under section 552.024 of the Government Code, DART must withhold the information we have marked under section 552.117(a)(1) of the Government Code. If the employee did not make a timely election under section 552.024, this information may not be withheld under section 552.117(a)(1).

Section 552.122 of the Government Code excepts from public disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated," but does not encompass evaluations of an employee's overall job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

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[2]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

You contend Exhibit C is excepted from disclosure under section 552.122(b) of the Government Code. You argue that the release of this information might undermine the selection process and compromise the effectiveness of future examinations. You state DART anticipates using the information submitted in Exhibit C for future evaluations of employees. Having considered your arguments and reviewed the information at issue, we find that the submitted collision avoidance assessment is a test item under section 552.122(b). We also find that release of the answers to the collision avoidance assessment would tend to reveal the questions themselves. Therefore, DART may withhold the collision avoidance assessment, along with the answers, which we have marked, pursuant to section 552.122(b). However, we find that the remaining information does not constitute a test item or evaluates general knowledge. Accordingly, the remaining information in Exhibit C is not excepted from disclosure under section 552.122 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." Gov't Code § 552.130(a). Therefore, DART must withhold the Texas driver's license information we have marked under section 552.130 of the Government Code.

In summary, DART may only release the medical records we have marked in Exhibit B in accordance with the MPA. DART must withhold the information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with common-law privacy. DART must withhold the information we have marked in Exhibit B under section 552.102(a) of the Government Code. If the employee whose personal information is at issue made a timely election under section 552.024 of the Government Code, DART must withhold the information we have marked under section 552.117(a)(1) of the Government Code. DART may withhold the collision avoidance assessment, along with the answers contained within the assessment, which we have marked, pursuant to section 552.122(b) of the Government Code. DART must withhold the Texas driver's license information we have marked under section 552.130 of the Government Code.[3] 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

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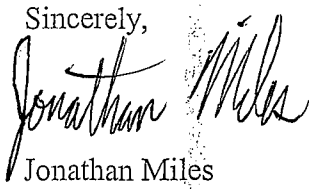
[3]We note Open Records Decision No. 684 also authorizes all governmental bodies to withhold a Texas driver's license number and a copy of a Texas driver's license under section 552.130 of the Government Code without the necessity of requesting an attorney general decision.

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 418390

Enc. Submitted documents

c: Requestor
(w/o enclosures)