



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 23, 2014

Ms. Halfreda Anderson-Nelson
Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2014-19127

Dear Ms. Anderson-Nelson:

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# 540488 (DART ORR No. 10990).

Dallas Area Rapid Transit ("DART") received a request for any DART police internal affairs investigations pertaining to two named officers for a specified time period. You state you have released some information to the requestor. We understand you have redacted motor vehicle record information under section 552.130(c) of the Government Code and social security numbers under section 552.147(b) of the Government Code.¹ You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

¹Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). 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 id.* § 552.147(b).

²We assume that 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 that those records contain substantially different types of information than that submitted to this office.

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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). We note the submitted internal affairs investigations are completed investigations subject to section 552.022(a)(1). DART must release the completed investigations pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See id.* Although you raise section 552.111 of the Government Code for some of the information subject to section 552.022(a)(1), section 552.111 is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, DART may not withhold the information subject to section 552.022(a)(1) under section 552.111. We note, however, some of the information subject to section 552.022(a)(1) may be subject to sections 552.102, 552.117, and 552.130 of the Government Code.³ Furthermore, you claim some of the information subject to section 552.022(a)(1) is excepted under section 552.108 of the Government Code. Because information subject to section 552.022(a)(1) may be withheld under sections 552.102, 552.108, 552.117, and 552.130, we will consider the applicability of these exceptions to the submitted information.

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 of the Government Code encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. However, this office has noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision 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), 470 at 4 (1987) (job performance does not generally constitute public employee's

³The 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).

private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees). Upon review, we find none of the information at issue satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the information at issue is not confidential under common-law privacy, and DART may not withhold it under section 552.101 on that ground.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the information at issue relates to a criminal investigation that has concluded in a final result other than conviction or deferred adjudication. *See id.* §§ 552.108(a)(2), .301(e)(1)(A). DART states report number 2012-1732029 pertains to a case that concluded in a result other than conviction or deferred adjudication. However, we note report number 2012-1732029 consists of information relating to an investigation conducted by the Austin Police Department (the "department"). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. *See* Open Records Decision Nos. 474 at 4-5 (1987), 372 (1983). Where an agency is in the custody of information that would otherwise qualify for exception under section 552.108 as information relating to the case of a different law enforcement agency, the custodian of the records may withhold the information only if it provides this office with (1) a demonstration that the information relates to the case, and (2) a representation from the entity with the law enforcement interest stating that entity wishes to withhold the information. In this instance, DART has not provided this office with a representation from the department that it wishes to withhold the information at issue. Accordingly, DART has failed to demonstrate section 552.108(a)(2) of the Government Code is applicable to report number 2012-1732029, and DART may not withhold any portion of the information at issue on that basis.

Section 552.108(b) of the Government Code 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 (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1). 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 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 No. 531 at 3-4 (1989) (detailed guidelines regarding police department's use of force policy). However, to claim this aspect of section 552.108 protection a governmental body must meet its burden of explaining how and why release of the information at issue 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 (former section 552.108 does not protect Penal Code provisions, common-law rules, and constitutional limitations on use of force), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques submitted 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 portions of the submitted information, which pertain to DART's policies on the use of force, are subject to section 552.108(b)(1). You state release of this information "would give an advantage to a suspect and may endanger the life or lives of DART Police Officers." Upon review, we find the release of some of the information at issue would interfere with law enforcement. Therefore, DART may withhold this information, which we have marked, under section 552.108(b)(1) of the Government Code.⁴ However, we conclude DART has not established the release of the remaining information at issue would interfere with law enforcement or prosecution. Therefore, DART may not withhold any of the remaining information at issue under section 552.108(b)(1) of the Government Code.

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 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.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find DART must withhold the dates of birth we have marked under section 552.102(a) 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, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or section 552.1175 of the Government Code to keep such information confidential. Gov't Code § 552.117(a)(2). We note section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. It is unclear whether the individuals whose information we have

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

marked are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, DART must withhold the information we have marked under section 552.117(a)(2) of the Government Code if the individuals at issue are currently licensed peace officers as defined by article 2.12. However, DART may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. If the individuals at issue are not currently licensed peace officers as defined by article 2.12, then DART may not withhold this information under section 552.117(a)(2).

Nevertheless, if the individuals at issue are not currently licensed peace officers, then the information at issue may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may be withheld under section 552.117(a)(1) only 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individuals at issue are not currently licensed peace officers as defined by article 2.12 and they timely requested confidentiality under section 552.024 of the Government Code, then DART must withhold the information we have marked under section 552.117(a)(1) of the Government Code. However, DART may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. If the individuals at issue are not currently licensed peace officers as defined by article 2.12 and they did not timely request confidentiality under section 552.024, then DART may not withhold the information at issue under section 552.117(a)(1).

As previously noted, pursuant to section 552.130(c) of the Government Code, DART has redacted information it determined to be subject to section 552.130(a) without requesting a decision from this office. However, we note the submitted information contains additional information subject to section 552.130. 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, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See Gov't Code* § 552.130(a). Upon review, we agree DART must withhold the information you redacted, the additional information we have marked, and the audible motor vehicle record information in the submitted audio recordings pursuant to section 552.130 of the Government Code.

In summary, DART may withhold the information we have marked under section 552.108(b)(1) of the Government Code. DART must withhold the dates of birth we have marked under section 552.102(a) of the Government Code. To the extent the information we have marked pertains to licensed peace officers, DART must withhold this information under section 552.117(a)(2) of the Government Code; however, DART may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. To the extent the information we have marked does not pertain to licensed peace officers, and to the extent the employees at issue timely elected to keep such information confidential under section 552.024, DART must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, DART may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. DART must withhold the information you redacted, the additional information we have marked, and the audible motor vehicle record information in the submitted audio recordings pursuant to section 552.130 of the Government Code. DART must release the remaining information.⁵

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/dls

⁵We note the audio recordings being released contain a social security number subject to section 552.147 of the Government Code. 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 officer under the Act. Gov't Code § 552.147(b).

Ref: ID# 540488

Enc. Submitted documents

c: Requestor
(w/o enclosures)