



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 10, 2015

Ms. Halfreda Anderson-Nelson
Public Information Officer
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2015-11366

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# 566689 (DART ORR #11456).

Dallas Area Rapid Transit ("DART") received a request for four categories of information pertaining to a specified job posting and e-mails concerning a named individual sent to and from named individuals to other named individuals during a specified time period.¹ You state you do not have information responsive to a portion of the request.² You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.122 of the Government Code. We have

¹You state DART sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

considered the exceptions you claim and reviewed the submitted representative sample of information.³

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 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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Additionally, this office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally private. *See* Open Records Decision Nos. 600 (1992) (employee’s designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, 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), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 455 at 9 (employment applicant’s salary information not private), 423 at 2 (1984) (scope of public employee privacy is narrow). We also note the public generally has a legitimate interest in information that relates to public employment and public employees. *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). Upon review, we find no portion of the submitted information is highly intimate or embarrassing and of no legitimate public concern, and DART may not withhold any of the submitted information under section 552.101 of the Government Code on the basis of common-law privacy.

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

³We 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.

Decision No. 626 (1994), this office determined 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. ORD 626 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).

You state some of the submitted information constitutes test items. You also state release of the information at issue would provide an unfair advantage to future applicants and impair DART’s ability to evaluate qualified candidates. However, upon review, we find the information at issue only evaluates the applicant’s general workplace skill, subjective ability to respond to particular situations, and overall suitability for employment, and does not test any specific knowledge of the applicant. Accordingly, we determine the information at issue does not consist of test items under section 552.122(b) of the Government Code. Therefore, DART may not withhold any of the information at issue under section 552.122 of the Government Code.

We note some of the submitted information may be subject to section 552.117 of the Government Code.⁴ Section 552.117(a)(1) of the Government Code 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 or official 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). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We note the protections of section 552.117 only apply to information that the governmental body holds in its capacity as an employer. *See id.* § 552.117(a)(1) (providing that employees of governmental entities may protect certain personal information in the hands of their employer); ORD 455 (statutory predecessor to section 552.117 does not except information pertaining to applicants who are not employees). 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 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 or not later than the 14th day after the date

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

on which the employee began employment with the city. *See* Gov't Code § 552.024(b). Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. We note section 552.117 protects personal privacy. Therefore, the requestor has a right of access to his own information under section 552.023 of the Government Code, and it may not be withheld from him under section 552.117. *See id.* § 552.023; ORD 481. Upon review, we conclude that, to the extent the employee and the applicants, if the applicants were ultimately hired, timely requested confidentiality 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; however, DART may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. Conversely, to the extent the applicants were not ultimately hired or any of the individuals did not timely request confidentiality under section 552.024, DART may not withhold the information we have marked under section 552.117(a)(1).

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. Accordingly, DART must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code 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 contained in the submitted information are not the types specifically excluded by section 552.137(c). We note 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 are not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, 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 affirmatively consent to disclosure.

In summary, to the extent the employee and the applicants, if the applicants were ultimately hired, timely requested confidentiality 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; 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 motor vehicle record information we have marked under section 552.130 of the Government Code. 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 affirmatively consent to disclosure. 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,



Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/dls

Ref: ID# 566689

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note the requestor has a right of access to some of the information being released, including his personal e-mail address. *See* Gov't Code §§ 552.023(a), 552.137(b) (personal e-mail address of member of public may be disclosed if owner of address affirmatively consents to its disclosure); ORD 481 at 4 (privacy theories not implicated when individuals request information concerning themselves).