



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 22, 2016

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

OR2016-09021

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# 606866.

Dallas Area Rapid Transit ("DART") received a request for DART's submission to the Federal Transit Administration, including any attachments, on a specified date and specified e-mails related to that submission during a specified time period. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.¹ You also indicate you notified AECOM of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have

¹Although you also raise section 552.102 through section 552.106 of the Government Code and section 552.108 through section 552.131 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claim that these sections apply to the submitted information. *See* Gov't Code §§ 552.301, .302. We also note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision No. 676 at 1 -2 (2002).

considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we must address DART's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), within ten business days after receiving a written request the governmental body must request a ruling from this office and state the exceptions to disclosure that apply. Gov't Code § 552.301(b). You state DART received the request for information on September 27, 2015. You state, and provide documentation showing, DART sought clarification on October 5, 2015, and received clarification on November 20, 2015. You also state, and provide documentation showing, DART sought further clarification on November 23, 2015, and received further clarification on December 14, 2015. *See id.* § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You state DART was closed on December 25, 2015. This office does not count the date the request was received or holidays the governmental body was closed for the purposes of calculating a governmental body's deadlines under the Act. You further state, and provide documentation showing, DART provided the requestor with a written statement itemizing the estimate of the charges for responding to his request and requiring a deposit on payment of these charges pursuant to sections 552.2615 and 552.263 of the Government Code on December 29, 2015. *See* Gov't Code §§ 552.2615 (providing governmental body shall provide requestor with estimate of charges if charges exceed \$40), .263(a) (governmental body may require deposit or bond for payment of anticipated costs in certain instances if governmental body provides requestor with written itemized statement). You provide documentation showing, in response to the itemized statement, the requestor modified his request on January 8, 2016. Thus, January 8, 2016, is the date on which DART is deemed to have received the request. *See id.* § 552.263(e-1) (modified request is considered received on the date the governmental body receives the written modification); *see also City of Dallas*, 304 S.W.3d 380, 387. You state DART was closed on January 18, 2016. Accordingly, DART's ten-business-day deadline was January 25, 2016. Although you inform us DART experienced a computer network failure on January 4, 2016, and was unable to gain access to the requested information until an unspecified date, we note you did not request a ruling from this office and state the exceptions to disclosure that apply until February 12, 2016. *See* Gov't Code § 552.308(a)(1) (describing rules for calculating

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.

submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). We note the ten-business-day deadline to request a ruling from this office and state the exceptions to disclosure that apply is statutorily imposed on DART by section 552.301(b), and this office is required to adhere to this provision when determining the timeliness of the submissions made by DART for purposes of requesting a ruling under the Act. *See id.* §§ 552.301, .302, .306. We also note, any communications with the requestor pursuant to section 552.221(d) of the Government Code do not affect the deadlines imposed on a governmental body under section 552.301. *See id.* § 552.221(d). Consequently, we find DART failed to comply with the requirements of section 552.301 in requesting this decision from our office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because DART has failed to comply with the procedural requirements of the Act, it has waived its claim under section 552.107 of the Government Code. *See* Open Records Decision Nos. 676 at 12 (claim of attorney-client privilege under section 552.107 or rule 503 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). However, because the interests of a third party and sections 552.101, 552.117, and 552.137 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will consider their applicability to the submitted information.³

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from AECOM. Thus, we have no basis to conclude AECOM has a protected proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, DART may not withhold any of the submitted information on the basis of any proprietary interest AECOM may have in the 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 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). You assert the submitted information you have indicated is protected under common-law privacy. Upon review, however, we find no portion of the information at issue is highly intimate or embarrassing and of no legitimate public concern, and DART may not withhold it under section 552.101 of the Government Code on the basis of common-law privacy.

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). 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 or official 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 or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the employee at issue 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. Conversely, to the extent the employee at issue did not timely request confidentiality under section 552.024, DART may not withhold the information under section 552.117(a)(1).

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* Gov’t Code

§ 552.137(a)-(c). Upon review, we find DART must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, to the extent the employee at issue 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. DART must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. DART must release the remaining information.

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,

A handwritten signature in black ink, appearing to read 'Meredith L. Coffman', with a long horizontal line extending to the right.

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/bw

Ref: ID# 606866

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)