



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 9, 2016

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

OR2016-10536

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# 608964 (DART ORR# W000533-021616).

Dallas Area Rapid Transit ("DART") received three requests for information pertaining to a specified incident and the personnel file of a named DART officer. You state DART has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative samples of information.² We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹You also claim some of this information is protected under the attorney-client privilege based on Texas Rule of Evidence 503. In this instance, however, the privilege claim is properly addressed under section 552.107, rather than rule 503. Open Records Decision No. 676 at 3 (2002).

²We assume the "representative samples" of records submitted to this office are 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.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the first request because it was created after the date the first request was received. We also note this information is not responsive to the remaining two requests. DART need not release nonresponsive information in response to these requests, and this ruling will not address that information.³

Next, we address your argument under section 552.108 of the Government Code as it is potentially the most encompassing. Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information you have indicated relates to a pending criminal prosecution. However, the requestor asserts section 552.108 is not applicable because the charge at issue has been dropped. Whether the requested information pertains to a criminal investigation that is pending is a question of fact. This office cannot resolve questions of fact in the open records process but, instead, must rely on the representations of the governmental body requesting our opinion. *See generally* Open Records Decision Nos. 554 (1990), 552 (1990). Therefore, based on DART’s representations, we find release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (delineating law enforcement interests present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of basic information, which must be released, DART may withhold the information DART has indicated under section 552.108(a)(1) of the Government Code.

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

³As we are able to make this determination, we need not address your argument against disclosure of this information.

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. This office has also found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy). 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. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of public employee's resignation or termination), 423 at 2 (1984). Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). We note that the fact that a public employee is sick is public information, but specific information about illnesses is excepted from disclosure. *See* ORD 470 at 4.

Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. DART has failed to demonstrate, however, the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, DART may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and

disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See Open Records Decision No. 631 at 3 (1995).*

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see ORD 615 at 5.* But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See Open Records Decision No. 313 at 3 (1982).*

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See Open Records Decision No. 561 at 9 (1990)* (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See ORD 561.*

You state the information you have indicated consists of advice, opinions, and recommendations relating to DART's policymaking. Upon review, we find the information at issue is purely factual information. Thus, we find you have failed to establish that any portion of the information you have indicated constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of DART. Accordingly, DART may not withhold any portion of the information you have indicated under section 552.111 of the Government Code.

We note the remaining responsive information includes information that is excepted from disclosure under section 552.102(a) of the Government Code.⁴ 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." 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, 348 (Tex. 2010).

⁴The Office of the Attorney General will raise mandatory exceptions like section 552.102 on behalf of a governmental body, but ordinarily will not raise other exceptions.

Upon review, we find DART must withhold the employee's date 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 disclosure the home address, home telephone number, social security number, emergency contact information, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure. *See* Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994). We note section 552.117(a)(2) encompasses a peace officer's personal cellular telephone and pager numbers if the officer personally pays for the cellular or pager service. *See* Open Records Decision No. 670 at 6 (2001); *see also* Open Records Decision No. 506 at 5-6 (1998) (Gov't Code § 552.117 not applicable to cellular mobile telephone numbers paid for by governmental body and intended for official use). Accordingly, DART must withhold the information we have marked under section 552.117(a)(2); however, DART may only withhold the marked personal cellular number under section 552.117(a)(2) if a governmental body does not pay for the cellular telephone service.

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's license or driver's license or a motor vehicle title or registration issued by a Texas agency, or an agency of another state or country. *See* Gov't Code § 552.130(a)(1)-(2). Upon review, we find DART must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

We note some of the remaining information consists of personal e-mail addresses subject to section 552.137 of the Government Code. 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* Gov't Code § 552.137(a)-(c). The e-mail address at issue is not a type specifically excluded by section 552.137(c). Accordingly, DART must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its disclosure.

In summary, with the exception of basic information, which must be released, DART may withhold the information DART has indicated under section 552.108(a)(1) of the Government Code. DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. DART must withhold the employee's date of birth we have marked under section 552.102(a) of the Government Code. DART must withhold the information we have marked under section 552.117(a)(2); however, DART may only withhold the marked personal cellular number under section 552.117(a)(2) if a governmental body does not pay for the cellular telephone service. 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 address we marked under section 552.137 of the Government Code, unless the owner of the

e-mail address affirmatively consents to its disclosure. The remaining responsive 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.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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 608964

Enc. Submitted documents

c: Requestor
(w/o enclosures)