



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 7, 2017

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

OR2017-07363

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# 652472 (ORR# W001368-011717).

Dallas Area Rapid Transit ("DART") received a request for all employment records of a named former DART police officer. You state DART has released some information to the requestor. Additionally, you state DART will redact dates of birth of public citizens pursuant to the previous determination issued to DART in Open Records Letter No. 2016-08689 (2016).¹ You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.²

¹Open Records Letter No. 2016-08689 is a previous determination issued to DART authorizing DART to withhold dates of birth of members of the public under section 552.101 of the Government Code in conjunction with common-law privacy without the necessity of requesting an attorney general's decision.

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

Initially, you state DART sought clarification regarding some of the information requested. *See* Gov't Code § 552.222 (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) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified). We understand the requestor has not responded to the request for clarification. Accordingly, we find DART has no obligation at this time to release any information that is responsive to the portion of the request for which it has not received clarification. *See* Open Records Decision No. 663 at 5 (1999) (10-business-day deadline tolled while governmental body awaits clarification in good faith). However, if the requestor responds to the clarification, then DART must seek a ruling from this office before withholding from the requestor any information that would be responsive to the clarification.

Next, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it does not pertain to the named officer. This ruling does not address the public availability of any information that is not responsive to the request and DART is not required to release such information in response to this request.

Next, we note the submitted information includes an officer's Texas Commission on Law Enforcement ("TCOLE") identification number. Section 552.002(a) of the Government Code defines "public information" as the following:

[I]nformation that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand the officer's TCOLE identification number is a unique computer-generated number assigned to peace officers for identification in TCOLE's electronic database, and may be used as an access device number on the TCOLE website. Thus, we find the officer's TCOLE number does not constitute public information under section 552.002 of the Government Code. Therefore, the officer's TCOLE number is not subject to the Act and need not be released to the requestor.

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. This office has also 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 highly intimate or embarrassing. *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), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy).

Generally, only highly intimate or embarrassing information implicating the privacy of an individual is withheld. However, in certain situations where the requestor knows the identity of the individual involved, as well as the nature of certain incidents, an entire report must be withheld to protect the individual's privacy. Upon review, we find you have not demonstrated, and the submitted information does not reflect, this is a situation in which the submitted information must be withheld in its entirety to protect an individual's privacy

interest. Upon review, however, we find some of the remaining information 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. However, DART has failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate concern to the public. Therefore, DART may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.101 also encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to the commission under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

- (a) All information submitted to the commission under this subchapter is confidential and is not subject to disclosure under [the Act], unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.
- (b) Except as provided by this subchapter, a commission member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. The submitted information includes an F-5 Report of Separation of Licensee form. We note the submitted F-5 form indicates the officer at issue was terminated due to a substantiated violation of the law other than a traffic offense. Therefore, we conclude the submitted F-5 form is not confidential under section 1701.454 of the Occupations Code, and it may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses information made confidential by statute, such as the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part:

- (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.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. 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). Upon review, we find the information we have marked constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician. As such, DART must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA. However, we find you have not demonstrated any of the remaining information is confidential under the MPA. Accordingly, DART may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses the Americans with Disabilities Act of 1990 (the "ADA"). *See* 42 U.S.C. §§ 12101 *et seq.* Title I of the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination" conducted to determine whether an employee is still able to perform the essential functions of his or her job is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Federal regulations define "disability" for the purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). Upon review, we find the information we have marked is confidential under the ADA. Accordingly, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the ADA.

However, we find you have not demonstrated any of the remaining information is confidential under the ADA. Accordingly, DART may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 258.102(a) of the Occupations Code, which reads as follows:

The following information is privileged and may not be disclosed except as provided by this subchapter:

- (1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and
- (2) a dental record.

Occ. Code § 258.102(a). A “dental record” means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See id.* § 258.101(1). Upon review, we find DART must withhold the dental record we have marked under section 552.101 of the Government Code in conjunction with section 258.102(a) of the Occupations Code.

Section 552.101 also encompasses section 452.061 of the Transportation Code, which provides in relevant part:

(e) Personal identifying information collected by an authority is confidential and not subject to disclosure under Chapter 552, Government Code, including a person’s:

- (1) name, address, e-mail address, and phone number;
- (2) account number, password, payment transaction activity, toll or charge record, or credit, debit, or other payment card number; and
- (3) other personal financial information.

Transp. Code § 452.061(e). We note DART is a regional transportation authority governed by chapter 452 of the Transportation Code. *See* Transp. Code ch. 452; *see also id.* § 452.001(1) (defining “authority” for purposes of chapter 452 of the Transportation Code). You assert the submitted information includes personal identifying information made confidential by section 452.061(e). Further, we note section 452.061 is intended, in relevant part, to protect the personal information of individuals who use public transit. *See* House Research Org., Bill Analysis, Tex. S.B. 57, 84th Leg., R.S. 2 (2015) (“Although open government and transparency are worthy goals, the state also has a responsibility to protect

the private information of Texans who use tolls roads and public transit.”). Upon review, we find no portion of the responsive information consists of personal identifying information of individuals who use public transit. Thus, we find you have failed to demonstrate any of the responsive information is confidential pursuant to section 452.061(e) of the Transportation Code. Accordingly, no portion of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

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 home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov’t Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular 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). We note this section does not apply to an individual’s work or office telephone number. In this instance, however, it is unclear whether the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12. If the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12, then DART must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, to the extent the telephone numbers at issue are cellular telephone numbers, DART may only withhold them if a governmental body did not pay for the cellular telephone service. Conversely, if the individuals at issue are not currently licensed police officers as defined by article 2.12, the information at issue may not be withheld under section 552.117(a)(2) of the Government Code.

If the individuals whose information is at issue are not currently licensed peace officers, then their personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, 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. Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* ORD 506 at 5-6. We note this section does not apply to an individual's work or office telephone number. 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). DART may only withhold the information at issue under section 552.117(a)(1) if the individuals whose information is at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. If these individuals made timely elections under section 552.024, then DART must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, to the extent the telephone numbers at issue are cellular telephone numbers, DART may only withhold them if a governmental body did not pay for the cellular telephone service. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, DART may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

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.³ *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 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Additionally, we note the remaining information includes Drug Enforcement Administration ("DEA") registration numbers. We understand these numbers are unique numbers assigned to specific healthcare providers and authorizes providers to prescribe prescription drugs and controlled substances. Accordingly, we find the DEA registration numbers consist of access device numbers for purposes of section 552.136. Accordingly, DART must withhold all insurance policy numbers and DEA identification numbers under section 552.136 of the Government Code.

In summary, this ruling does not address the public availability of the non-responsive information we have marked, and DART is not required to release such information in

³The 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 Nos. 481 (1987), 480 (1987), 470 (1987).

response to this request. The officer's TCOLE number is not subject to the Act and need not be released. 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 information we marked under section 552.101 of the Government Code in conjunction with the MPA. DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the ADA. DART must withhold the dental record we have marked under section 552.101 of the Government Code in conjunction with section 258.102(a) of the Occupations Code. DART must withhold the dates of birth we have marked under section 552.102(a) of the Government Code. To the extent the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12, DART must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, to the extent the telephone numbers at issue are cellular telephone numbers, DART may only withhold them if a governmental body did not pay for the cellular telephone service. To the extent the individuals whose information is at issue are not currently licensed peace officers and made timely elections under section 552.024, then DART must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, to the extent the telephone numbers at issue are cellular telephone numbers, DART may only withhold them if a governmental body did 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 all insurance policy numbers and DEA identification numbers under section 552.136 of the Government Code. The remaining information must be released to the requestor.

Finally, you ask this office to issue seven previous determinations. Specifically, you ask this office to issue previous determinations permitting DART to withhold certain information under section 552.101 of the Government Code in conjunction with sections 159.002, 258.102, and 1701.454 of the Occupations Code; section 452.061 of the Transportation Code; section 58.007 of the Family Code; section 411.831 of the Government Code; and the ADA without the necessity of requesting a ruling from this office. *See id.* § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). We decline to issue any such previous determinations at this time. Accordingly, 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 'KH', is positioned above the typed name.

Kieran Hillis
Assistant Attorney General
Open Records Division

KH/sb

Ref: ID# 652472

Enc. Submitted documents

c: Requestor
(w/o enclosures)