



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 15, 2007

Ms. Hyattye O. Simmons  
Interim General Counsel  
Dallas Area Rapid Transit  
P.O. Box 660163  
Dallas, Texas 75266-0163

OR2007-05953

Dear Ms. Simmons:

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# 278666.

Dallas Area Rapid Transit ("DART") received two requests for eight categories of information relating to environmental contamination at a piece of land that was originally owned by Texas Instruments and is now the site of the LBJ-Central DART Rail Station. You claim that the requested information is excepted from disclosure under sections 552.107 and 552.111<sup>1</sup> of the Government Code and Texas Rule of Evidence 503.<sup>2</sup> We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>3</sup> We have also considered comments submitted by the requestor. *See Gov't*

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<sup>1</sup>In your brief, you refer to the attorney-work product privilege. The correct exception to raise is section 552.111 of the Government Code.

<sup>2</sup>DART asserts section 552.022 of the Government Code as an exception to disclosure. We note that section 552.022 makes certain categories of information expressly public, and thus is not an exception to disclosure. *See Gov't Code* § 552.022.

<sup>3</sup>We 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.

Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

We first address DART's argument that the information at issue is confidential based on Provision 7 of the Right of Entry Agreement executed between Texas Instruments and DART. We note that governmental bodies may not enter into agreements to keep information confidential except where specifically authorized to do so by statute. *See* Open Records Decision Nos. 605 (1992), 585 (1991), 514 (1988). Accordingly, no part of the information at issue may be withheld based on the agreement executed between Texas Instruments and DART.

DART explains that the information in Attachments B and C constitute an investigation into DART's acquisition of the land that is the subject of this request. DART acknowledges these attachments are subject to required public disclosure under section 552.022 of the Government Code. Section 552.022 provides in relevant part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]

*Id.* § 552.022(a)(1). Therefore, pursuant to section 552.022, DART must release the completed investigation unless it is confidential under other law. DART raises sections 552.107 and 552.111 for this information, but sections 552.107 and 552.111 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.107 and 552.111 do not qualify as "other law" that make information confidential for the purposes of section 552.022. Therefore, DART may not withhold Attachments B and C under section 552.107 or 552.111 of the Government Code.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are other laws within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is found at Texas Rule of Evidence 503 and the attorney work product privilege is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will consider your assertion of these privileges under rule 503 and rule 192.5 with respect to the information subject to section 552.022.

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Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the e-mail in Attachment B consists of a communication between a DART attorney and DART employee that was made in furtherance of the rendition of professional legal services. You also state that the communication was intended to be confidential.

Therefore, we agree that this e-mail may be withheld on the basis of the attorney-client privilege under Texas Rule of Evidence 503. However, you do not explain how any of the remaining communications and investigative information constitute an attorney-client communications for the purposes of rule 503. Further, the communications at issue are between DART employees and various third parties we do not understand to be privileged. Therefore, the remaining information is not protected by the attorney-client privilege and may not be withheld under rule 503.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.* Although DART asserts the work product privilege, it does not provide any explanation of how this exception applies. Further, as previously stated, some of the information at issue does not involve privileged parties. Accordingly, no part of the remaining information may be withheld pursuant to rule 192.5.

We note that the remaining information contains a Texas license plate number. Section 552.130 of the Government Code excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." *Id.* § 552.130. DART must withhold the Texas license plate number we have marked.

In summary, DART may withhold the e-mail in Attachment B pursuant to the attorney-client privilege in rule 503 of the Texas Rules of Evidence. DART must withhold the Texas license plate number we have marked under section 552.130 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kara A. Batey  
Assistant Attorney General  
Open Records Division

KAB/mcf

Ref: ID# 278666

Enc. Submitted documents

c: Mr. Jeff Bounds  
Dallas Business Journal  
12801 North Central Expressway  
Dallas, Texas 75243  
(w/o enclosures)

Mr. Jon Weisberg  
Legal Counsel  
Texas Instruments  
P.O. Box 655474  
Dallas, Texas 75265