ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 28, 2008

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

OR2008-14652

Dear Mr. Simmons:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 326470.

The Dallas Area Rapid Transit ("DART") received a request for all findings, reports, and memoranda pertaining to a specific complaint. The requestor also seeks all e-mails exchanged between two named individuals during a specific work week. You claim the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered your claimed exceptions to disclosure and have reviewed the submitted information.

The submitted records are part of a completed investigation. Section 552.022 of the Government Code makes certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. One such category of expressly public information under section 552.022 is a completed report, audit, evaluation, or investigation made of, for, or by a governmental body. *See* Gov't Code § 552.022(a)(1). Information subject to section 552.022(a)(1) may only be withheld if it is excepted under section 552.108 or is confidential under "other law." *Id.* You claim Attachments C-1, C-2, C-3, and C-4 are excepted from disclosure under sections 552.107 and 552.111 of the Government Code. Sections 552.107 and 552.111 are discretionary exceptions that do not make information

confidential. Open Records Decision Nos. 677 at 8 (2002) (Gov't Code § 552.111 is not other law for purposes of Gov't Code § 552.022), 676 at 6 (2002) (Gov't Code § 552.107 is not other law for purposes of Gov't Code § 552.022); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, you may not withhold these attachments under sections 552.107 and 552.111 of the Government Code. However, the attorney-client and attorney work product privileges are also found in rule 503 of the Texas Rules of Evidence and rule 192.5 Texas Rule of Civil Procedure respectively. Because the Texas Supreme Court has held that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022 of the Government Code, we will consider whether Attachments C-1, C-2, C-3, and C-4 may be withheld under these rules. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will also address your arguments that Attachment B is confidential under section 552.101 of the Government Code.

We begin by addressing your arguments that Attachments C-1, C-2, C-3, and C-4 are privileged under rule 503 of the Texas Rules of Evidence. 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. 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 explain the records submitted as Attachments C-1, C-2, C-3, and C-4 are e-mail communications and their attachments that were created by employees and attorneys of DART in furtherance of providing legal services to DART. You state these communications were intended to be confidential and that their confidentiality has been maintained. After reviewing your arguments and the records at issue, we agree these documents are privileged attorney-client communications. Therefore, DART may withhold these attachments under rule 503.[1]

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the common-law right of privacy. For information to be protected by common-law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

Attachment B is an investigation report containing witness statements that were gathered during the course of an investigation of alleged racial discrimination by a DART employee. You assert the witness statements contain intimate and embarrassing information that is of no legitimate public interest. Accordingly, you seek to withhold Attachment B in its entirety under common-law privacy. These documents, however, pertain solely to the actions of employees while acting as public servants and the conditions prescribed by DART for their continued employment. Consequently, we disagree with your assertion that such information is outside the realm of public interest. *See* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). Therefore, you may not withhold any of the information in

[1]Because our determination under rule 503 is dispositive, we need not address your arguments that these attachments are attorney work product.

Attachment B under common-law privacy. As you do not raise any additional exceptions to the disclosure of Attachment B, it must be released in its entirety.

In summary, DART may withhold Attachments C-1, C-2, C-3, and C-4 under rule 503. Attachment B 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

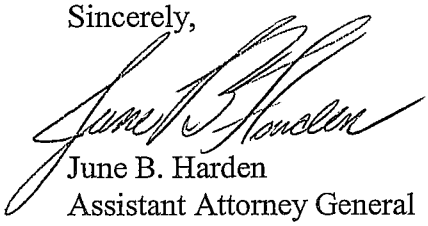
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/sdk

Ref: ID# 326470

Enc: Submitted documents

c: Mr. Brett Shipp
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(w/o enclosures)