



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 4, 2010

Ms. Shirley Thomas
Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2010-01755

Dear Ms. Thomas:

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# 369454 (DART ORR# 6994).

Dallas Area Rapid Transit ("DART") received a request for all information on a specified STARR write up, including all e-mail correspondence by the individual making the discipline decision and case studies used to make the decision including present and past practices. You state you have released some information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, you inform us that DART asked the requestor to clarify the portion of the request related to case studies used to make decisions including present and past practices. We note that a governmental body may communicate with a requestor for the purpose of clarifying

¹Although you also raise Texas Rule of Evidence 503, we note that, in this instance, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 is section 552.107. *See* Open Records Decision No. 676 at 1-2 (2002).

²We assume 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 those records contain substantially different types of information than that submitted to this office.

or narrowing a request for information. See Gov't Code § 552.222(b); Open Records Decision No. 663 at 2-5 (1999). We also note that a governmental body is not required to answer factual questions, conduct legal research, or create new information in response to a request. See Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request for information held by the governmental body. See Open Records Decision No. 561 at 8 (1990). In this instance, we assume DART has made a good faith effort to relate the request to information in DART's possession. We understand DART has not received a response to its request for clarification. Accordingly, we find DART has no obligation at this time to release any information that may be responsive to the part of the request for which it has not received clarification. However, if the requestor responds to the clarification request, DART must seek a ruling from this office before withholding any responsive information from the requestor. See ORD 663 (10-business-day deadline tolled while governmental body awaits clarification).

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. You seek to withhold the submitted witness statements under section 552.101 in conjunction with the ruling in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S. Ct. 846 (2009). In *Crawford*, the U. S. Supreme Court held the anti-retaliation provision of section 704(a) of Title VII of the 1964 Civil Rights Act also protects employees who answer questions during an employer's internal investigation into discrimination, rather than just when employees complain on their own or take part in a formal investigation. *Crawford*, 129 S. Ct. at 849. You contend "this ruling makes clear that the information about who is filing a complaint or participates in an internal investigation under the anti-retaliation provisions are [sic] confidential [.]". Upon review, however, we find the *Crawford* decision did not address the confidentiality of individuals who make complaints. *Id.* at 846. Therefore, because *Crawford* does not make information confidential for purposes of the Act, the submitted information may not be withheld under section 552.101 on that basis.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. See Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. See *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third,

the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, meaning it was “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).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.) Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that Attachment C consists of confidential communications between a DART attorney and DART employees made for the purpose of facilitating the rendition of professional legal services. You have identified the parties to the communications, and you state they have remained confidential. Based on your representations and our review, we determine the corrective action/disciplinary action review form and STARR form, which we have marked, constitute privileged attorney-client communications and may be withheld under section 552.107 of the Government Code. However, the remaining information consists of witness statements made by DART employees to their manager and a human resources representative. These communications were not between or among clients, client representatives, lawyers, and lawyer representatives for the purpose of facilitating the rendition of professional legal services. Therefore, the remaining information does not constitute privileged attorney-client communications and therefore may not be withheld on that basis. As you raise no further exceptions to the disclosure of the remaining information, it 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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/dls

Ref: ID# 369454

Enc. Submitted documents

c: Requestor
(w/o enclosures)