



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 14, 2010

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

OR2010-13938

Dear Mr. 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# 393269 (DART ORR# 7510).

Dallas Area Rapid Transit ("DART") received a request for information pertaining to allegations against a named DART official, including information presented to, discussed, or acted upon by DART's ethics committee, auditors, or board. You state DART will release some of the requested information. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted information.<sup>1</sup>

Initially, you inform this office that a portion of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-08397 (2010). In that ruling, we concluded DART may withhold the

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<sup>1</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.

information at issue pursuant to rule 503 of the Texas Rules of Evidence. You represent the law, facts, and circumstances on which the prior ruling was based have not changed. Accordingly, DART may continue to rely on Open Records Letter No. 2010-08397 as a previous determination and withhold the information previously ruled upon in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not subject to Open Records Letter No. 2010-08397, we will address your arguments against disclosure.

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. This section encompasses information other statutes make confidential. Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." *Id.* § 551.104(c). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Open Records Decision No. 495 (1988). You inform us portions of the information responsive to this request consist of tapes of a closed meeting.<sup>2</sup> Therefore, DART must withhold this information from the public pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.<sup>3</sup>

You claim the remaining submitted information is excepted from disclosure pursuant to section 552.107(1) of the Government Code. Section 552.107(1) protects information coming 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. 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

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<sup>2</sup>We note DART is not required to submit the certified agenda or tape of a closed meeting to this office for review. *See* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information under statutory predecessor to Gov't Code § 552.101).

<sup>3</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including certified agendas and tapes of closed meetings under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code, without the necessity of requesting an attorney general decision.

other than that of providing or facilitating professional legal services to the client governmental body. *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). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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, *id.* 503(b)(1), 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. *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, and provide an affidavit asserting, the remaining submitted information consists of investigation documents and related communications created by a DART attorney for DART employees and board members. You explain this information constitutes attorney-client communications made in connection with the investigation of an ethics complaint against a DART official. You represent the communications were made for the purpose of facilitating the rendition of professional legal services to DART. You state the remaining information was intended to be confidential, and has remained confidential. Based on your representations and our review, we find you have demonstrated the remaining submitted information consists of privileged attorney-client communications. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding attorney’s entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, DART may withhold the remaining submitted information under section 552.107 of the Government Code.<sup>4</sup>

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of the submitted information.

In summary, DART may continue to rely on Open Records Letter No. 2010-08397 as a previous determination and withhold the identical information previously ruled upon in accordance with that ruling. DART must withhold the responsive closed meeting tapes pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code. DART may withhold the remaining information pursuant to section 552.107 of the Government Code.

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](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,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/dls

Ref: ID# 393269

Enc. Submitted documents

c: Requestor  
(w/o enclosures)