



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 13, 2010

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

OR2010-18619

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# 402705 (DART ORR 7726).

The Dallas Area Rapid Transit ("DART") received a request for the file pertaining to a suspension against the requestor, including any information associated with the investigation. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. We have considered your arguments and reviewed submitted representative sample of information.¹

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was either created after the date the request was received or does not pertain to the suspension or investigation specified in the request. This ruling does not address the public availability of non-responsive information, and DART is not required to release non-responsive information in response to this request.

Next, we note the responsive information is subject to section 552.022(a)(1) of the Government Code, which provides:

¹We 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.

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

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The responsive information pertains to completed investigations made by DART. This information must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. You claim this information is excepted under sections 552.103 and 552.107. However, these sections are discretionary exceptions that protect a governmental body's interests and are, therefore, not "other law" for purposes of section 552.022. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived); 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not "other law" that makes information confidential for the purposes of section 552.022, and the submitted information may not be withheld under those sections. We note that the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertions of the attorney-client privilege under rule 503 of the Texas Rules of Evidence. In addition, you claim the information is excepted under section 552.101 of the Government Code. Because information subject to section 552.022(a)(1) may be withheld under section 552.101 of the Government Code, we will also consider the applicability of this exception to the submitted information.

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.

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 it is 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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that Attachment B-1 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 information we have marked constitutes privileged attorney-client communications and may be withheld pursuant to rule 503 of the Texas Rules of Evidence.

However, the remaining information consists of communications that 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.

In summary, DART may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The remaining information must be released.²

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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LER/dls

Ref: ID# 402705

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note that the information being released contains confidential information to which the requestor has a right of access. See Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Therefore, if DART receives another request for this particular information from a different requestor, then DART must again seek a decision from this office.