ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 5, 2011

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

OR2011-09482

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# 422594 (DART ORR# 8151).

The Dallas Area Rapid Transit ("DART") received a request for invoices of legal fees paid to the law firm of Hallet and Perrin, P.C. from January 2009 to the date of the request. You claim the submitted fee bills are privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted representative sample of information.[1]

Initially, you inform us portions of the requested information were the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2010-11588 (2010), 2010-07639 (2010), and 2009-15514 (2009). In these decisions, we ruled DART may withhold certain portions of the information at issue pursuant to Texas Rule of Evidence 503, and DART must release the remaining information. We have no indication that the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, DART may continue to rely on Open Records Letter Nos. 2010-11588, 2010-07639, and 2009-15514 as previous determinations and continue to withhold or release any previously ruled upon information in accordance with these prior

[1]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.

rulings. *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 fee bills were not previously ruled upon, we will consider your arguments against disclosure.

We note, and you acknowledge, attorney fee bills are subject to section 552.022(a)(16) of the Government Code, which provides that information in a bill for attorney's fees must be released unless it is privileged under the attorney-client privilege or is expressly confidential under other law. *See* Gov't Code § 552.022(a)(16). You assert that the submitted attorney fee bills are privileged under the attorney-client privilege of rule 503 of the Texas Rules of Evidence and the attorney work product privilege of rule 192.5 of the Texas Rules of Civil Procedure. 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. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex.2001). Therefore, we will determine whether DART may withhold any of the information in the attorney fee bills under Texas Rule of Evidence 503 or Texas Rule of Civil Procedure 192.5.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

> 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 claim the fee bills are confidential in their entirety under Texas Rule of Evidence 503. Section 552.022(a)(16) of the Government Code provides, however, information "that is *in* a bill for attorney's fees" is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov't Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See* Open Records Decision No. 676 (2002) (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)); 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney's legal advice). This office has found that only information that is specifically demonstrated to be protected by the attorney-client privilege or made confidential by other law may be withheld from fee bills. *See* ORD 676.

You state the remaining attorney fee bills contain communications between DART employees, DART attorneys, and DART's outside attorneys made for the purpose of facilitating the rendition of professional legal services to DART. You state the communications were made in confidence, and that confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the information at issue. Thus, DART may withhold this information, which we have marked, under Texas Rule of Evidence 503. However, the remaining information either reveals communications with a party who is not identified as privileged or does not reveal communications. Therefore, you have failed to demonstrate the remaining information is protected under the attorney-client privilege. Consequently, DART may not withhold any of the remaining information at issue under Texas Rule of Evidence 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 when the governmental body received the request for information and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

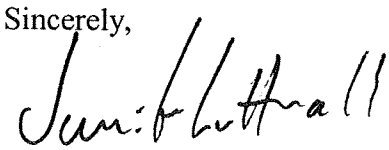
You state the remaining information in the attorney fee bills is related to pending litigation to which DART is a party. You contend the remaining information is confidential in its entirety under rule 192.5. Alternatively, you contend portions of the information should be withheld. As previously noted, section 552.022(a)(16) does not permit the entirety of an attorney fee bill to be withheld. *See* ORD 676, 589. Having considered your arguments and reviewed the information at issue, we conclude you have not demonstrated that any of the remaining information consists of core work product for purposes of Texas Rule of Civil Procedure 192.5. Thus, DART may not withhold any of the remaining information under rule 192.5.

In summary, DART may continue to rely on Open Records Letter Nos. 2010-11588, 2010-07639, and 2009-15514 as previous determinations and continue to withhold or release any previously ruled upon information in accordance with these prior rulings. DART may withhold the information we have marked under Texas Rule of Evidence 503.

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 422594

Enc. Submitted documents

c: Requestor
(w/o enclosures)