



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 3, 2012

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

OR2012-19340

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# 472687 (DART ORR #9303).

Dallas Area Rapid Transit ("DART") received a request for information pertaining to a specified investigation, and a named officer's training, performance, and disciplinary history. You state you have released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.122 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

Initially, we note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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 submitted corrective action/disciplinary action review form and draft notice of disciplinary action are part of a completed investigation that is subject to section 552.022(a)(1) and must be released unless they are either confidential under the Act or other law or are excepted from disclosure under section 552.108 of the Government Code. *See id.* Although you seek to withhold this information under sections 552.107 and 552.111 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See 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), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver).* Consequently, DART may not withhold the review form or draft notice under either section 552.107 or section 552.111 of the Government Code. However, 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). Accordingly, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503. We will also address your argument against disclosure for the remaining information.

Texas Rule of Evidence 503(b)(1) 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 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, 426-27 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the review form and draft notice constitute 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, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney's entire investigative report 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 corrective action/disciplinary action review form and the draft notice under rule 503 of the Texas Rules of Evidence.

Section 552.122(b) of the Government Code excepts from disclosure “[a] test item developed by a . . . governmental body[.]” Gov’t Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated,” but does not encompass evaluations of an employee’s overall job performance or suitability. ORD 626 at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976).

You contend the remaining submitted information is excepted from disclosure under section 552.122(b) of the Government Code. You argue that release of the Accutest IDenta Training Program Exam, the Police Training Officer Program Board of Evaluators questions, and the problem based exercises would undermine the police officer selection process and compromise the effectiveness of future examinations. Having considered your arguments and reviewed the information at issue, we find the information we have marked qualifies as test items for purposes of section 552.122(b). We also find release of the answers to these questions would tend to reveal the questions themselves. Therefore, DART may withhold the information we have marked under section 552.122 of the Government Code. However,

the remaining information you seek to withhold under section 552.122 does not constitute a test item for purposes of section 552.122 of the Government Code. Therefore, the remaining information may not be withheld on that basis.

In summary, DART may withhold the corrective action/disciplinary action review form and the draft notice under rule 503 of the Texas Rules of Evidence. DART may withhold the information we have marked under section 552.122 of the Government Code. The remaining information 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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/eb

Ref: ID# 472687

Enc. Submitted documents

c: Requestor
(w/o enclosures)