



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 27, 2006

Mr. Swanson W. Angle
General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75226-0163

OR2006-03005

Dear Mr. Angle:

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# 245181.

Dallas Area Rapid Transit ("DART") received a request for various correspondence and investigative records regarding a former employee's professional conduct. You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code and protected under rule 192.5 of the Texas Rules of Civil Procedure and rule 503 of the Texas Rules of Evidence.¹ We have considered the exceptions you claim and reviewed the submitted information, a portion of which you state is a representative sample.²

¹We note that DART also raises section 552.022 of the Government Code as an exception to disclosure. Section 552.022 provides a list of eighteen categories of information that are expressly public and may not be withheld unless confidential under other law. Thus, section 552.022 is not an exception to disclosure under the Act and does not provide a basis for withholding information from disclosure.

²We 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.

We begin by noting that the submitted information is subject to section 552.022 of the Government Code. This section provides in part that

the following categories of information are public information and not excepted from required disclosure under this chapter 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). In this instance, you inform us that the submitted information consists of a completed investigation made of, for, or by DART. Therefore, this information must be released under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Because section 552.101 of the Government Code does constitute "other law" for purposes of section 552.022, we will address DART's claim regarding this exception. However, sections 552.107 and 552.111 of the Government Code are discretionary exceptions to public disclosure that protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). As such, sections 552.107 and 552.111 are not "other law" that makes information confidential for the purposes of section 552.022. Therefore, DART may not withhold any of the submitted information under sections 552.107 or 552.111.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). You assert the attorney-client privilege under Texas Rule of Evidence 503 for Attachments C, D, and E. 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 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 assert that the information submitted in Attachments C, D, and E consist of confidential attorney-client communications. You state that these communications were made by attorneys for DART to their client in connection with the investigation to which the submitted information pertains. You indicate that these communications have not been disclosed to non-privileged parties. Based on your representations and our review of the information in question, we conclude that DART may withhold the information in Attachments C, D, and E under Texas Rule of Evidence 503.³ *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (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).

Next, we address section 552.101 of the Government Code. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional,

³As our ruling is dispositive, we need not address your remaining argument against disclosure for this information.

statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the common law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court applied the common law right to privacy to an investigation of alleged sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See id.* at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public’s interest in the matter. *Id.* The court also held that “the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims of and witnesses to the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See Open Records Decision Nos. 393 (1983), 339 (1982)*. If no adequate summary of the investigation exists, then all of the information relating to the investigation must ordinarily be released, except for information that would identify the victims and witnesses. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. Common law privacy does not protect information about a public employee’s alleged misconduct on the job or complaints made about a public employee’s job performance. *See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978)*.

You state that Attachments B and F pertain to an investigation of alleged sexual harassment. Accordingly, we find that *Ellen* is applicable to this information. Upon reviewing the information at issue, we determine there is no adequate summary of the investigation and DART must release this information. However, based on *Ellen*, DART must withhold the identities of the victim and the witnesses in Attachments B and F. We have marked the information that must be withheld in Attachment B. We note, however, that Attachment F is an audio recording of a witness statement. If DART lacks the technical capability to redact identifying information of the victim and witnesses from this audio recording, then it must withhold Attachment F in its entirety. *See Open Records Decision No. 364 (1983)*.

In summary, DART may withhold Attachments C, D, and E under Texas Rule of Evidence 503. DART must withhold the information we have marked in Attachment B and redact identifying information of the victim and witnesses from the audio recording in Attachment F under section 552.101 of the Government Code in conjunction with common law privacy

as expressed in *Ellen*. However, if DART lacks the technical capability to redact identifying information of the victim and witnesses from this audio recording, then it must withhold Attachment F in its entirety.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Lisa V. Cubriel
Assistant Attorney General
Open Records Division

LVC/jh

Ref: ID# 245181

Enc: Submitted documents

c: Mr. Tony Hartzel
P.O. Box 940567
Plano, Texas 75094
(w/o enclosures)