



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

September 9, 2008

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

OR2008-12415

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# 321325.

The Dallas Area Rapid Transit ("DART") received a request for eight categories of information, specifically (1) the current bylaws, roster, and minutes of any meetings in the past 24 months of the DART Employee Activities Committee ("EAC"), (2) a list of the officers of the EAC for the past 24 months along with each officer's position at DART, (3) all letters, reports, memoranda, or documents pertaining to the EAC that were issued, printed, or e-mailed between January 1, 2007 and June 20, 2008, (4) all financial statements, bank statements, or other financial documents regarding the EAC for the past five years, (5) all communications between January 1, 2007 and June 20, 2008 between any DART executive concerning either the EAC or any vendor with products available to DART employees through payroll deductions, and communications between DART and the State Comptroller's Office (the "comptroller"), (6) any documents related to an audit or review by the comptroller regarding payroll deductions, (7) any EAC financial records that show the amount and frequency of payroll deductions, and (8) any receipts, bills, or purchase orders related to the DART Christmas party. You claim portions of the requested information are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.

Initially, we note you only have submitted information responsive to categories 3 through 8. We assume the "representative sample" of information you submitted that is responsive to categories 3 through 8 is truly representative of these types of responsive records. *See* Open Records Decision Nos. 499 (1988), 497 (1988). Consequently, this decision 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. However, we note you did not submit any information responsive to categories 1 and 2. To the extent any information responsive to these categories of information existed on the date DART received this request, we assume you have released it to the requestor. If you have not released any such information, you must release it at this time. See Gov't Code §§ 552.301(a), .302.

We also note section 552.022 of the Government Code is applicable to some of the information in Attachment B. Section 552.022(a)(3) provides for required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]" *Id.* § 552.022(a)(3). We have marked the information that is subject to section 552.022. DART must also release this information unless it is expressly confidential under other law. Section 552.103 of the Government Code, which you raise for this information, is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. 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 Gov't Code § 552.103); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, DART may not withhold the information that is subject to section 552.022, which we have marked, under section 552.103. We will, however, address your section 552.103 argument with regard to the rest of Attachment B that is not subject to section 552.022. Sections 552.130 and 552.136, however, are other laws for purposes of section 552.022. Thus, we first address the applicability of these exceptions to the information in Attachment B that is subject to section 552.022.<sup>1</sup>

Section 552.130 excepts from disclosure "information [that] relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). Accordingly, DART must withhold the Texas driver's license information we have marked in Attachment B under section 552.130 of the Government Code.

Attachment B also contains information subject to section 552.136 of the Government Code, which states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b). Accordingly, DART must withhold the bank account numbers we have marked under section 552.136 of the Government Code.

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

We now turn to your argument under section 552.103 for the rest of the information in Attachment B that is not subject to section 552.022. Section 552.103 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this instance, you claim Attachment B is excepted from disclosure under section 552.103 because DART reasonably anticipates litigation. You inform us, and have submitted documentation showing, that prior to the date DART received the instant request for information, DART received a letter from an attorney making a demand for payment and threatening to sue DART and EAC if the dispute is not resolved. You state DART and the EAC reasonably believed that litigation would ensue and sought legal representation in the alleged claim. Having reviewed your arguments and the submitted information, we conclude litigation was reasonably anticipated on the date DART received this request for information. Furthermore, we find the information in Attachment B is related to the anticipated litigation for purposes of section 552.103(a). We therefore conclude DART may withhold the rest of the information in Attachment B, not subject to section 552.022, pursuant to section 552.103 of the Government Code.<sup>2</sup>

Next, you contend the information in Attachments C-1 through C-7 is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information that comes 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 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).

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). 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, 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 writ). 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)

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

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 Attachments C-1 through C-7 constitute confidential communications between DART attorneys and DART employees made in furtherance of rendering professional legal services to DART. You have identified the parties to each of the e-mail communications. You also state these communications have remained confidential. Based on your representations and our review of the information at issue, we agree the e-mails in Attachments C-1 through C-7 constitute privileged attorney-client communications. Accordingly, DART may withhold this information under section 552.107 of the Government Code.<sup>3</sup>

In summary, DART must withhold the information we have marked in Attachment B under (1) section 552.130 of the Government Code and (2) section 552.136 of the Government Code. Except as we have marked for release, DART may withhold the rest of the information in Attachment B under section 552.103 of the Government Code. DART may also withhold Attachments C-1 through C-7 under section 552.107 of the Government Code. The remaining information must be released to the requestor.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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

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<sup>3</sup>As our ruling is dispositive, we do not address your argument under section 552.111 for this information.

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 challenge 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,



Katherine M. Kroll  
Assistant Attorney General  
Open Records Division

KMK/eeg

Ref: ID# 321325

Enc. Submitted documents

c: Mr. Michael A. Lindenberger  
*The Dallas Morning News*  
508 Young Street  
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(w/o enclosures)