



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 26, 2010

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

OR2010-07639

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# 380632 (DART ORR #7258).

Dallas Area Rapid Transit ("DART") received a request for all invoices regarding Hallet & Perrin, P.C. ("Hallet"), including invoices from June 2009 to the present. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, we note a portion of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-15514 (2009). In that decision, we ruled that a portion of the information at issue was excepted from disclosure under Texas Rule of Evidence 503. As we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, DART must

¹We 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.

continue to rely on that ruling as a previous determination and continue to treat any previously ruled upon information in accordance with that prior ruling.² 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). Accordingly, we will address your remaining arguments for the submitted information not previously ruled on.

We note the submitted information consists of attorney fee bills. As 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). Although you assert that information contained in the submitted fee bills is excepted from disclosure by section 552.103 of the Government Code, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. See *Dallas Area Rapid Transit*, 4 S.W.3d 469 at 475-76; ORD No. 665 at 2 n.5. Accordingly, DART may not withhold information contained in the submitted fee bills under section 552.103. However, section 552.101 of the Government Code and rule 503 of the Texas Rules of Evidence do constitute "other law" for purposes of section 552.022. In *re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (Texas Rules of Evidence are "other law" within the meaning of section 552.022). Therefore, we will determine whether DART may withhold any of the information in the attorney fee bills under Texas Rule of Evidence 503 or section 552.101 of the Government Code.

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

²As our ruling is dispositive of this information, we need not address your arguments against its disclosure.

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 that the fee bills in their entirety are confidential under Texas Rule of Evidence 503. However, section 552.022(a)(16) of the Government Code provides that 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 No. 676.

You state that the submitted attorney fee bills contain confidential communications between DART’s outside attorneys and DART that were made for the purposes of facilitating the rendition of professional legal services to DART. Based on your representations and our review of the information at issue, we agree that the attorney fee bills contain information that reveals confidential communications between privileged parties. Accordingly, we have marked the information that is protected by the attorney-client privilege and may, therefore,

be withheld pursuant to rule 503 of the Texas Rules of Evidence. The remaining information, however, does not consist of or reveal confidential attorney-client communications. Thus, you have failed to demonstrate that any of the remaining information documents privileged attorney-client communications. Accordingly, none of the remaining information may be withheld under Texas Rule of Evidence 503.

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. This section encompasses the common-law right to privacy. Information is protected from disclosure by the common-law right to privacy when (1) it is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* 681-82.

You argue that the remaining information should be withheld in its entirety under section 552.101 of the Government Code in conjunction with common-law privacy. You claim the information in the submitted fee bills that relates to a specified DART employee is confidential pursuant to common-law privacy and "special circumstances." You indicate that this information implicates the personal safety of this employee. However, the Third Court of Appeals recently ruled that the "special circumstances" exception found in past Attorney General Open Records Decisions directly conflicts with Texas Supreme Court precedent regarding common-law privacy. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. and Hearst Newspapers, L.L.C.*, 287 S.W.3d 390 (Tex. App.—Austin 2009, pet. filed). The court of appeals ruled that the two-part test set out in *Industrial Foundation* is the "sole criteria" for determining whether information can be withheld under common-law privacy. *Id.*; *see also Indus. Found.*, 540 S.W.2d at 686. Upon review, we find that the information related to the specified DART employee is not highly intimate or embarrassing. As you have failed to meet the first prong of the *Industrial Foundation* test for privacy, we find that the information at issue is not confidential under common-law privacy and DART may not withhold it under section 552.101. Further, no portion of the information not related to the specified DART employee is highly intimate or embarrassing and not of legitimate public interest. Thus, no portion of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, DART must continue to rely on Open Records Letter No. 2009-15514 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. DART may withhold the information we have marked under Texas Rule of Evidence 503. 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,

A handwritten signature in black ink, appearing to read "Jennifer Burnett", with a long horizontal flourish extending to the right.

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 380632

Enc. Submitted documents

c: Requestor
(w/o enclosures)