



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 7, 2011

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

OR2011-12927

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# 429010 (DART ORR # 8312).

Dallas Area Rapid Transit ("DART") received a request for: (1) invoices of legal fees from the law firm of Hallet and Perrin, P.C. from a specified period of time, (2) correspondence to or from named individuals pertaining to a specified incident, and (3) access to laws, statutes, rules, or guidelines regarding a prohibition of passengers leaving a light-rail or transit vehicle without authorization. You state you have released some of the responsive information. You claim the submitted e-mails are excepted from disclosure under section 552.107 of the Government Code and 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

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.

Nos. 2011-09482 (2011), 2010-11588 (2010), 2010-07639 (2010), and 2009-15514 (2009). In these decisions, we ruled DART may withhold certain portions of the submitted fee bills at issue pursuant to Texas Rule of Evidence 503, and DART must release the remaining fee bills at issue. 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. 2011-09482, 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.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).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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 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 Tex. 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). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies to only communications between or among clients, client representatives, lawyers, and lawyer representatives. 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 to only a confidential communication, *id.*, 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental

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

body must explain the confidentiality of a communication has been maintained. Section 552.107(1) 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 the e-mail correspondence in Attachment B-4 constitutes confidential communications between DART attorneys and employees that were made for the purpose of providing legal advice to DART. You explain the communications were intended to be, and have remained, confidential. Based on your representations and our review, we conclude DART may generally withhold Attachment B-4 on the basis of the attorney-client privilege under section 552.107 of the Government Code. We note, however, one of the otherwise privileged e-mail strings contains an e-mail from an individual who is not a privileged party in this instance. Thus, to the extent this non-privileged e-mail, which we marked, exists separate and apart from the submitted e-mail strings, it may not be withheld under section 552.107.

We note the non-privileged e-mail contains an e-mail address subject to section 552.137 of the Government Code.³ Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). The e-mail address we marked is not of a type specifically excluded by section 552.137(c). Accordingly, DART must withhold the e-mail address we marked under section 552.137 unless the owner of the address affirmatively consents to its release.⁴

In summary, DART may continue to rely on Open Records Letter Nos. 2011-09482, 2010-11588, 2010-07639, and 2009-15514 as previous determinations and withhold or release the previously ruled upon information in accordance with these prior rulings. DART may withhold Attachment B-4 under section 552.107 of the Government Code; however, to the extent the marked non-privileged e-mail exists separate and apart from the otherwise privileged e-mail strings, the non-privileged e-mail may not be withheld under section 552.107. In that event, DART must withhold the e-mail address we marked under

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

section 552.137 of the Government Code unless its owner affirmatively consents to its release, and release the remaining portion of the e-mail at issue.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/bs

Ref: ID# 429010

Enc. Submitted documents

c: Requestor
(w/o enclosures)