



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2012

Ms. Kerri L. Butcher
Interim Chief Counsel
Capital Metropolitan Transportation Authority
2910 East Fifth Street
Austin, Texas 78702

OR2012-13594

Dear Ms. Butcher:

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# 463495.

The Capital Metropolitan Transportation Authority (the "authority") received a request for seven categories of information related to a fatal bus-pedestrian incident. You state information will be redacted from responsive records pursuant to sections 552.130(c) and 552.136(c) of the Government Code and the previous determination issued under section 552.130(a)(2) in Open Records Decision No. 684 (2009).¹ You claim other responsive information is excepted from disclosure under section 552.107(1) of the Government Code. We have considered the exception you claim and reviewed the information you submitted.

¹Section 552.130(c) authorizes a governmental body to redact the driver's license and personal identification information described in subsections 552.130(a)(1) and (a)(3) without the necessity of requesting a decision under the Act. *See* Gov't Code § 552.130(c); *see also id.* § 552.130(d)-(e) (requestor may appeal governmental body's decision to withhold information under Gov't Code § 552.130(c) to attorney general, and governmental body withholding information pursuant to section 552.130(c) must provide notice to requestor). Section 552.136(c) authorizes a governmental body to redact access device numbers subject to section 552.136(b) without requesting a decision. *See id.* § 552.136(c); *see also id.* § 552.136(d)-(e) (requestor may appeal governmental body's decision to withhold information under Gov't Code § 552.136(c) to attorney general, and governmental body withholding information pursuant to section 552.136(c) must provide notice to requestor). Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including a Texas license plate number under section 552.130.

We first note the authority sent the requestor a written estimate of the cost of providing the remaining responsive information. *See* Gov't Code § 552.2615. You do not indicate whether the requestor has responded to the cost estimate. *See id.* § 552.2615(b). In any event, we note section 552.2615 is only applicable

[i]f a request for a copy of public information will result in the imposition of a charge under [subchapter F of the Act] that exceeds \$40, or a request to inspect a paper record will result in the imposition of a charge under Section 552.271 [of the Act] that exceeds \$40.

Id. § 552.2615(a). The submitted estimate of the cost of providing the remaining responsive information is \$32.00. Thus, section 552.2615 of the Government Code is not applicable in this instance. Therefore, the present request for information has not been withdrawn by operation of law, and the authority must release the remaining responsive information on payment of costs.

We next note the submitted information consists of a completed report prepared for the authority's insurer. As such, the submitted information is subject to section 552.022(a)(1) of the Government Code, which provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is made confidential under the Act or other law or excepted from disclosure under section 552.108 of the Government Code. *Id.* § 552.022(a)(1). You do not claim an exception to disclosure under section 552.108. Section 552.107(1) of the Government Code, which you do claim, is a discretionary exception to disclosure that does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the submitted information may not be withheld under section 552.107(1). The Texas Supreme Court has held, however, that the attorney-client privilege found in Texas Rule of Evidence 503 is "other law" for purposes of section 552.022(a)(1) of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (addressing applicability of TEX. R. EVID. 503 to information encompassed by Gov't Code § 552.022(a)(1)). Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503.

Rule 503 enacts the attorney-client privilege and provides in part:

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). 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. *See* ORD 676 at 6-7.

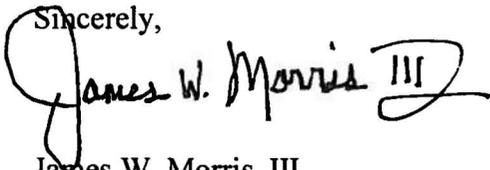
Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the submitted information constitutes a communication among the authority, outside legal counsel for the authority, and the Texas Municipal League Intergovernmental Risk Pool ("TML") that was made for the purpose of providing legal services to the authority. You explain TML is the authority's liability insurer. You state the submitted information was intended to be and remains confidential. You contend release of this information would compromise future claims related to the incident to which the information pertains and reveal the authority's litigation and settlement strategies. Based on your representations and our review of the information at issue, we conclude the authority may withhold the submitted information under Texas Rule of Evidence 503. *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 capacity as attorney for purpose of providing legal services and advice).

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 that reads "James W. Morris III". The signature is written in a cursive style with a large initial "J" and a stylized "III" at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/bhf

Ref: ID# 463495

Enc: Submitted documents

c: Requestor
(w/o enclosures)