



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 25, 2010

Mr. William Christian
Graves, Dougherty, Hearon & Moody, P.C.
P.O. Box 98
Austin, Texas 78767

OR2010-02872

Dear Mr. Christian:

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# 371329.

The Del Mar College District (the "college"), which you represent, received a request for 1) correspondence, grievances, open records requests, and memoranda by or to any of five specified individuals and related to the requestor, her job performance, or the reorganization of her position during a specified time period; 2) a specified report; and 3) correspondence pertaining to the hiring of a named individual.¹ The college received a second request for the findings and supporting evidence pertaining to the second requestor's "grievances, appeals, etc." filed with the college during a specified time period. You state the college is releasing some of the responsive information. You claim that the submitted information, which you inform us is responsive to both of the requests, is excepted from disclosure under section 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.² We have considered your arguments and reviewed the submitted information,

¹The college sought and received a clarification of the information requested in the first request for information. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

²Although you raise section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence, we note that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002). We also note that although you raise the attorney-client privilege under rule 503 of the Texas Rules of Evidence for all of the submitted information, section 552.107 is the proper exception to raise for your attorney-client privilege claim for some of the submitted information in this instance. *See id.*

a portion of which is a representative sample.³ In addition, we have received comments from both of the requestors.⁴ *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we must address the second requestor's assertion that the college did not comply with section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). The second requestor states that he initially requested the information at issue in a letter dated December 15, 2009, which the second requestor contends he hand-delivered to all of the members of the college board of regents, the board of regents' attorney, and the college president on the same date. However, the college represents that it did not receive a request for the information at issue from the second requestor until December 17, 2009. The determination of the date that the college received the second request for information is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Thus, we must accept the college's representation that it received the second request for information on December 17, 2009. We note that this office does not count the date the request was received or holidays as business days for the purpose of calculating a governmental body's deadlines under the Act. The college informs this office that the college was closed for business during winter break from December 21, 2009 through January 1, 2010. Accordingly, the tenth business day after the receipt of the second request was January 14, 2010. The college's request for a ruling from this office is dated and was received by facsimile on January 14, 2010. Therefore, we conclude that the college complied with the procedural requirements of section 552.301(b).

Next, you inform us, and we agree, that one of the submitted documents consists of a completed report by the college's outside counsel that is subject to section 552.022 of the Government Code. Section 552.022 provides in pertinent part:

³We assume that the representative samples of records submitted to this office are 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.

⁴The second requestor asks this office, among other things, to open a criminal investigation. Conducting such an investigation is beyond the scope of this office's authority in issuing open records rulings. *See* Gov't Code § 552.301(a) (open records division's authority is limited to determining, upon a governmental body's request, whether requested information falls within an exception to disclosure). Thus, this ruling does not address the issues raised by the second requestor that are beyond the scope of our authority. However, this office has forwarded copies of the second requestor's correspondence to the Criminal Investigations Division.

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). The college must release the completed report, which we have marked, under section 552.022(a)(1) of the Government Code unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under other law. You raise the attorney-client privilege found in rule 503 of the Texas Rules of Evidence for the completed report. The Texas Supreme Court held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Open Records Decision No. 676 (2002). Accordingly, we will consider your assertion of this privilege under rule 503 with respect to the information subject to section 552.022(a)(1).

Texas Rule of Evidence 503 enacts the attorney-client privilege. 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 represent that the completed report consists of a communication between the college's outside counsel and the college's president and attorneys. You state that this report was made for the purpose of facilitating the rendition of professional legal services to the college. You also state that this information was intended to be and remains confidential. The first requestor contends that the attorney-client privilege has been waived with respect to the report because the findings of the report "were summarily conveyed to [the second requestor] . . . at an open Board of Regents meeting." However, the first requestor does not assert that the report itself has been released to the public. Accordingly, based on the college's representations, including the college's representation that the report at issue has retained its confidentiality, we conclude the report may be withheld under Texas Rule of Evidence 503.

Next, you raise the attorney-client privilege for the remaining information not subject to section 552.022. Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. The test for determining whether information is protected under the attorney-client privilege under section 552.107(1) is the same as that discussed above under Texas Rule of Evidence 503. First, a governmental body must demonstrate that the information constitutes or documents a communication. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. 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." ORD 676.

You represent that the remaining information consists of communications between attorneys for and representatives of the college that were made for the purpose of facilitating the rendition of professional legal services to the college. You further state that this information was intended to be and remains confidential. Based on your representations and our review, we conclude the remaining information may be withheld under section 552.107(1) of the Government Code.

In summary, the college may withhold the submitted report under rule 503 of the Texas Rules of Evidence. The remaining submitted information may be withheld under section 552.107(1) of the Government Code.

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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/jb

Ref: ID# 371329

Enc. Submitted documents

c: Requestor
(w/o enclosures)