



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 27, 2011

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

OR2011-13938

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# 431151.

The Del Mar College District (the "district"), which you represent, received a request for the requestor's personnel file and information pertaining to the investigation of the requestor's complaint. You state the district has released the requestor's personnel file. You claim the remaining requested information is excepted from disclosure under section 552.107 of the Government Code and privileged pursuant to rule 503 of the Texas Rules of Evidence.<sup>1</sup> We have considered your arguments and reviewed the submitted representative sample of information.<sup>2</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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<sup>1</sup>Although 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).

<sup>2</sup>We 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.

Initially, we note Exhibits B and C are subject to section 552.022 of the Government Code. Section 552.022 provides as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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[.]

*Id.* § 552.022(a)(1). Exhibits B and C are part of a completed report made for the district. Therefore, Exhibits B and C are subject to section 552.022(a)(1). The district may only withhold this information if it is confidential under section 552.108 or “other law.” You claim this information is excepted from disclosure under section 552.107 of the Government Code. However, section 552.107 is a discretionary exception to disclosure that protects the governmental body’s interests and may be waived. *See* Open Records Decision No. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, section 552.107 is not “other law” that makes information confidential for purposes of section 552.022; therefore, the district may not withhold the information at issue under this section. However, you also claim the attorney-client privilege pursuant to rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held the Texas Rules of Evidence are “other law” within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of this privilege under rule 503 for Exhibits B and C. We will also consider your argument under section 552.107 of the Government Code for Exhibit D.

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

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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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).

As previously noted, Exhibits B and C are part of a completed report made for the district. You explain the report was authored by an attorney retained by the district’s outside counsel. You state the attorney was retained to provide legal services to the district by investigating allegations contained in the complaint filed by the requestor and provide factual findings and legal opinions. You assert Exhibits B and C consist of a communication from the attorney to the district’s outside counsel, who in turn communicated this information to the district’s Board of Regents. You state Exhibits B and C were intended to be confidential, and that confidentiality has been maintained.

The requestor alleges the attorney who authored the report represented herself solely as an investigator and not as an attorney representing the district when she interviewed witnesses for the report. Whether the attorney disclosed the fact that she represented the district is not a factor this office considers when determining the applicability of the attorney-client privilege. As previously stated, in order to withhold attorney-client privileged information from disclosure under rule 503, the district must show, in part, that the communication was made in furtherance of the rendition of professional legal services to the district. The district represents the attorney was hired to provide legal services to the district. The district represents, and the submitted documents reflect on their face, Exhibits B and C are a communication from the attorney to the district and the district’s outside counsel in

furtherance of the rendition of these legal services to the district. The requestor also contends the attorney who created the report was not acting in her capacity as an attorney and, consequently, the attorney-client privilege does not apply to Exhibits B and C. The requestor explains complaints similar to her complaint would normally be investigated by the district's Complaint Coordinator; however, because her complaint named the Complaint Coordinator as a respondent, the Complaint Coordinator could not conduct the investigation in this instance. The requestor contends that because the attorney who authored the report was hired to investigate the requestor's complaint, the attorney is, thus, acting as the district's Complaint Coordinator and not as an attorney providing legal services. We note the question of whether the attorney who authored the report was acting in her capacity as an attorney 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 Record Decision No. 522 at 4 (1990). As previously noted, the district represents that the attorney who authored the report was hired as an attorney to provide legal services to the district. Therefore, based on the district's representations and our review of the submitted documents, we find the district has demonstrated the applicability of the attorney-client privilege to Exhibits B and C. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding that attorney's entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the district may withhold Exhibits B and C on the basis of the attorney-client privilege under Texas Rule of Evidence 503.

We next turn to your argument under section 552.107(1) of the Government Code for Exhibit D, which is not subject to section 552.022. Section 552.107 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 is the same as that discussed above under Texas Rule of Evidence 503. First, a governmental body must demonstrate 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 Exhibit D consists of communications between the district's outside counsel and a district employee which were made for the purpose of facilitating professional legal services to the district. You state these communications were intended to be confidential and

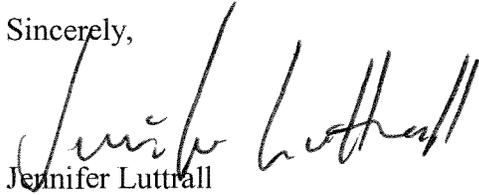
the district has protected their confidentiality. Based on your representations and our review, we conclude the district has established Exhibit D is protected by the attorney-client privilege. Therefore, the district may withhold Exhibit D under section 552.107(1) of the Government Code.

In summary, the district may withhold Exhibits B and C pursuant to rule 503 of the Texas Rules of Evidence and Exhibit D under section 552.107 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](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,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/dls

Ref: ID# 431151

Enc. Submitted documents

c: Requestor  
(w/o enclosures)