



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 23, 2012

Ms. Melissa A. Mihalick
For Wharton County Junior College
Bracewell & Giuliani, LLP
711 Louisiana Street, Suite 2300
Houston, Texas 77002-2770

OR2012-13441

Dear Ms. Mihalick:

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# 462992.

The Wharton County Junior College (the "college"), which you represent, received a request for seven categories of information, including a specified document, communications between the college and a named individual, and any information, investigation, or reports regarding the requestor's client.¹ You state you are in the process of releasing some of the requested information to the requestor. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted to this office by the requestor. *See Gov't Code § 552.304* (interested party may submit comments explaining why information should or should not be released).

¹We note the college sought and received clarification of the information requested. *See Gov't Code § 552.222* (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Initially, we note a portion of the submitted information in Exhibit D, which we have marked, is not responsive to the present request for information because it was created after the college received the request. This ruling does not address the public availability of non-responsive information, and the college need not release such information in response to this request.

Next, we note Exhibit C consists of a completed investigation report, and is therefore subject to section 552.022(a)(1) of the Government Code. Section 552.022(a) provides in relevant part the following:

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 unless made confidential under this chapter or 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). Although you assert this information is excepted from disclosure under section 552.107, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the college may not withhold the completed investigation report under section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your arguments under Texas Rule of Evidence 503 for the information in Exhibit C. We will also consider your arguments under section 552.107 for the submitted information not subject to section 552.022.

Rule 503(b)(1) provides the following:

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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (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. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You seek to withhold an investigation report completed by outside counsel for the college under the attorney-client privilege. You state the college retained outside legal counsel "to investigate and provide his opinion on the validity of alleged violations of [c]ollege policy and protocol." You state the investigator was "hired in his capacity as an attorney and the primary purpose of his retention was the rendition of a legal opinion." You indicate the investigation report has remained confidential. We note the requestor contends in his comments to this office that the attorney-client privilege does not apply to the investigation report or to communications with the investigator because the investigator "was not hired to represent the college, but to interview and investigate" the requestor's client. The requestor further contends that he spoke to the investigator to clarify his role, and the investigator told the requestor "that he was not acting in the capacity of an attorney" with respect to the investigation. Whether the investigator was acting in his capacity as an attorney for the college for the purposes of the attorney-client privilege is a question of fact. This office

cannot resolve disputes of fact in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *Id.* Accordingly, based on your representations and our review of the submitted information, we find you have demonstrated the investigator was acting in his capacity as an attorney for the college for the purposes of the attorney-client privilege when creating the investigation report at issue, and in his communications with the college. Accordingly, we find you have demonstrated the applicability of the attorney-client privilege to the investigation report. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding 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 college may withhold Exhibit C under rule 503 of the Texas Rules of Evidence.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. 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* 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. *See* 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. *See 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 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 that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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 only to 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental 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 seek to withhold the information in Exhibits B and D, and portions of the information in Exhibit E, under section 552.107(1). You state the e-mails and the letter in Exhibit B consist of attorney-client privileged communications between the outside counsel retained by the college to complete the investigation discussed above and college employees and representatives. You state the e-mails and letters in Exhibit D consist of attorney-client privileged communications between college employees and representatives and the college's general counsel. You also seek to withhold portions of the timeline in Exhibit E, which you state was prepared by college representatives in connection with the college's internal investigation. You state certain entries in the timeline, and their corresponding attachments, are protected by the attorney-client privilege. You indicate these communications have remained confidential. Accordingly, we find you have demonstrated the applicability of the attorney-client privilege to the information in Exhibits B and D, and the portions of Exhibit E we have marked. Therefore, the college may generally withhold the information in Exhibits B and D, and the information we have marked in Exhibit E, under section 552.107 of the Government Code. However, we note some of the attachments to the otherwise privileged communications in Exhibits D and E were sent to or received from non-privileged parties. Thus, to the extent these non-privileged attachments, which we have marked, exist separate and apart from the otherwise privileged communications, they may not be withheld under section 552.107, and must be released. With respect to the remaining information you seek to withhold in Exhibit E under section 552.107, we find you have failed to demonstrate that these documents consist of attorney-client privileged communications. Accordingly, the college may not withhold any of the remaining information in Exhibit E under section 552.107 of the Government Code.

In summary, the college may withhold Exhibit C under rule 503 of the Texas Rules of Evidence. The college may generally withhold Exhibits B and D, and the information we have marked in Exhibit E, under section 552.107 of the Government Code. However, to the extent the non-privileged attachments we have marked in Exhibits D and E exist separate and apart from the otherwise privileged communications, they may not be withheld under section 552.107, and must be released. 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 cursive script, appearing to read "Kristi L. Wilkins".

Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/ag

Ref: ID# 462992

Enc. Submitted documents

c: Requestor
(w/o enclosures)