



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 18, 2010

Ms. Destinee Waiters
Assistant General Counsel
Houston Community College
3100 Main Street
Houston, Texas 77002

OR2010-07127

Dear Ms. Waiters:

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# 379732.

The Houston Community College (the "college") received a request for a specified investigative report of the requestor's allegations regarding the college police department (the "department"); a specified internal affairs report on the requestor's complaint, including the findings and recommendations; and the requestor's complete human resources and department employee files. You state the college has released some information to the requestor. You claim the submitted report 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 by the requestor and interested parties. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially we note the submitted information is 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[.]

Gov't Code § 552.022(a)(1). The submitted report is a completed report made for a governmental body. Therefore, the report is subject to section 552.022(a)(1). The college 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 college may not withhold the information at issue under this section. However, the attorney-client privilege is also found in 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 the submitted report.

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).

You state, and provide documentation showing, the attorney who authored the report at issue was retained by the college to provide legal services to the college by investigating allegations contained in the complaint filed by the requestor, providing factual findings and legal opinions, and making a recommendation for the disposition of the complaint. You state the report reflects a communication from the attorney to the college's chancellor and the college's assistant general counsel. You state the report has only been viewed by the following college employees or officers: chancellor, board of trustees, general counsel, assistant general counsels, and board counsel and that the confidentiality of the report has been maintained.

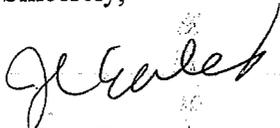
The requestor and interested parties allege the attorney who authored the report represented herself solely as an investigator and not as an attorney representing the college when she interviewed witnesses for the report. Whether the attorney disclosed the fact that she represented the college is not a factor this office considers when determining the applicability of the attorney-client privilege. As stated above, in order to withhold attorney-client privileged information from disclosure under rule 503, the college must show, in part, that the communication was made in furtherance of the rendition of professional legal services to the college. We note the college submitted a letter of engagement between the college and the attorney showing the attorney was hired to provide legal services to the college. The college represents, and the submitted documents reflect, the report is a communication from the attorney to the college in furtherance of the rendition of these legal services to the college. The requestor asserts, however, the confidentiality of the report has not been maintained because it has been seen by individuals other than those listed above. We note, however, the individuals who the requestor lists as having seen the report are all representatives of the college, and thus qualify as client representatives. Thus, the release of the report to these individuals does not destroy the confidentiality of the report. *See* ORD 676 at 8 (explaining application of attorney-client privilege to communications to client representatives). Finally, the requestor asserts the attorney who created the report did not

intend for the report to remain confidential because the attorney told the requestor and interested parties to file open records requests in order to receive copies of the report. We note the attorney-client privilege belongs to the client, not the attorney. *See id.* at 2 (generally discussing attorney-client privilege). Therefore, it is only the college's assertion of the attorney-client privilege we will consider. Based on the college's representations and our review of the submitted information, we find the college has demonstrated the applicability of the attorney-client privilege to the report. *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 college may withhold the report on the basis of the attorney-client privilege under Texas Rule of Evidence 503.

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,



Jessica Eales
Assistant Attorney General
Open Records Division

JCE/eeg

Ref: ID# 379732

Enc. Submitted documents

c: Requestor
(w/o enclosures)